Supreme Court, U.S.
FILED
021419 MAR 21 2003
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

SHENANGO INCORPORATED; STELCO USA, INC.; STELCO COAL COMPANY; AND MUELLER INDUSTRIES, INC.,
Petitioners,

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY; MICHIAEL M. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; GAIL R. WILENSKY, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICAN COMBINED BENEFIT FUND,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRDCIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an operator that did not promise lifetime healthcare benefits to its employees, and therefore cannot constitutionally be held responsible for lifetime healthcare benefits for such miners under *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), can lose the constitutional protection of that decision through a federal statutory provision that purports to retroactively impute a promise of lifetime healthcare benefits by the operator, based on common ownership in 1992 with another entity that did make such a promise to its own employees?

LIST OF PARTIES

All of the parties to this proceeding are listed in the caption of this case.

CORPORATE DISCLOSURE STATEMENT

Petitioner Shenango Incorporated has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Stelco USA, Inc.'s parent corporation is Stelco Inc., which owns 10% or more of Stelco USA, Inc.'s stock.

Petitioner Stelco Coal Company's parent corporation is Stelco, Inc., which owns 10% or more of Stelco Coal Company's stock.

Petitioner Mueller Industries, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 307 F.3d 174 (3d Cir. 2002) and is reprinted in the Appendix hereto at 3a - 49a. The opinion of the Court of Appeals denying panel rehearing is reprinted in the Appendix hereto at 1a - 2a. The opinion of the District Court is reported at 2000 U.S. Dist. LEXIS 22208 (W.D. Pa. July 25, 2000) and is reprinted in the Appendix hereto at 50a - 61a.

JURISDICTION

The Court of Appeals entered judgment against Petitioners Shenango Incorporated, Stelco USA, Inc., Stelco Coal Company, and Mueller Industries, Inc. (collectively the "Companies") on September 24, 2002. The Companies filed a timely Petition for Panel Rehearing, which the Court denied on December 23, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be deprived of life, liberty, or property, without due process or law; nor shall private property be taken for public use, without just compensation.

Selected Portions of the Administrative Procedures Act

5 U. S. C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Selected Portions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq*.

Section 9701

(c)(1) Signatory Operator. The term "signatory operator" means a person which is or was signatory to a Coal Wage Agreement.

(c)(2) Related persons. (A) In general. A person shall be considered to be a related person to a signatory operator if that person is --

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

(B) Time for determination. The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

Section 9706

(a) In general. For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which --

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which --

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

(b) Rules relating to employment and reassignment upon purchase. For purposes of subsection (a) --

(1) Aggregation rules. (A) Related persons. Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator....

(B) Certain employment disregarded. Employment with-- (i) a person which is (and all related persons with respect to which are) no longer in business....

STATEMENT OF THE CASE

Introduction

This case involves the Commissioner of Social Security's ("Commissioner") assignment of liability to the Companies for the healthcare benefits of retired coal miners and their dependants under Section 9706(a)(3) of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. § 9706(a)(3), and the Commissioner's corresponding refusal to revoke those assignments in response to this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). As set forth more fully below, the Companies are in

a position substantially identical to the operator in *Eastern Enterprises* because, as in that case, the Commissioner made the assignments based solely on the signatory status of the signatory operators who had employed the miners, each of whom last signed a Coal Wage Agreement ("CWA") before the 1974 CWA, which was the first one to promise lifetime healthcare benefits. Therefore, the assignments violated the Due Process and/or Takings Clauses of the Fifth Amendment and should have been revoked under the Administrative Procedures Act because they were not in accordance with law.

Procedural Background

The Companies brought suit against the Commissioner and the Trustees of the United Miner Workers of America Combined Benefit Fund ("Combined Fund") under the Fifth Amendment's Due Process and Takings Clauses and the Administrative Procedures Act when, in response to this Court's decision in *Eastern Enterprises*, the Commissioner voided the assignments of thousands of Coal Act beneficiaries to over 100 hundred companies because they had not signed a 1974 or later CWA, but refused to void the Companies' assignments. On July 25, 2000, the United States District Court for the Western District of Pennsylvania dismissed the complaint. The Companies appealed to the Court of Appeals for the Third Circuit, which affirmed the District Court on September 24, 2002. The Companies then filed a timely Petition for Panel Rehearing, which the Court of Appeals denied on December 23, 2002.

Factual Background

A. The Coal Industry Retiree Health Benefit Act of 1992

The history of the Coal Act has been discussed at length in a number of cases including *Eastern Enterprises*, 524 U.S. at 504-15, and *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 442-446 (2002). Congress enacted the Coal Act in 1992 to rescue from insolvency the health benefit funds that had been established for union coal miners and their dependants through bargaining between the United Mine Workers of America and the Bituminous Coal Operators Association.

Among other things, the Coal Act merged the UMWA 1950 and 1974 Benefit Plans into the Combined Fund. Healthcare for the Combined Fund's beneficiaries is financed through the Commissioner's assignment of retired miners to signatory operators under Section 9706(a) of the Coal Act, and the Combined Fund's corresponding assessment of per beneficiary premiums on the signatory operators for each such assigned miner or beneficiary.

In addition, Section 9704 of the Coal Act provides that any "related person" to a signatory operator is jointly and severally liable for the payment of the operator's Combined Fund premiums. An entity is a "related person" to a responsible signatory operator if that entity was a member of a controlled group of corporations that included the signatory operator on July 20, 1992. 26 U.S.C. § 9701(c)(2). If the responsible signatory operator was not in business on July 20, 1992, then the related person status is determined as of the time immediately before the signatory operator ceased to be in business. 26 U.S.C. § 9701(c)(2)(B).

The Coal Act contains a three-tiered priority system that the Social Security Administration ("SSA") must follow for making assignments to signatory operators. 26 U.S.C. § 9706(a). Under Section 9706(a)(3), if the retiree's most recent employer is still in business, but did not sign a 1974 or later CWA, then the retiree is to be assigned to the pre-1974 signatory operator that employed him the longest. Thus, under Section 9706(a)(3), the Commissioner could make assignments to an operator that had not been signatory to a CWA for 30 or 40 years. The assignment rules also provide that, where the signatory operator is no longer in business, the Commissioner can make the assignments to a "related person" to the defunct operator.

B. *Eastern Enterprises*

In *Eastern Enterprises*, this Court considered the constitutionality of Section 9706(a)(3), as applied to a company that did not sign a 1974 or later CWA.[1] In a plurality decision, this Court concluded that the assignments to companies that did not sign the 1974 or later CWAs were void as unconstitutional because of the "extremely retroactive burden" the Coal Act placed on such companies. *Eastern Enterprises*, 524 U.S. at 538.

1. The Facts of the *Eastern Enterprises* Decision

SSA assigned over 1,000 retired miners with a total liability of 50 to 100 million dollars to Eastern Enterprises ("Eastern"), a former coal mining company. *Eastern*

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[1] The 1974 and 1978 CWAs were the first to contain language promising retirees lifetime healthcare benefits.

Enterprises, 524 U.S. at 516-517; 529. Eastern had employed these 1,000 miners before it left the coal mining business in 1965. *Id.* at 516-517. Eastern signed each CWA from 1947 through 1964. *Id.* at 516. At the end of 1965, however, Eastern transferred its coal related operations to a wholly owned subsidiary, Eastern Associated Coal Corporation ("EACC"). *Id.* Eastern retained its full ownership in EACC through another subsidiary corporation until 1987 when Eastern sold EACC to a third party. *Id.*

From 1966 until the sale of EACC in 1987, Eastern shared officers and supervising management with EACC. *Id.* In fact, Eastern officials acting in their roles as EACC directors, ratified the 1974 and 1978 CWA, which were the first agreements to expressly refer to and provide guaranties regarding lifetime healthcare benefits for retirees. *Id.*

2. The *Eastern Enterprises* Decision

This Court ruled that the Coal Act was unconstitutionally retroactive as applied to Eastern. Justice O'Connor's plurality opinion, in which Justices Rehnquist, Scalia and Thomas concurred, held that the Coal Act effected an unconstitutional taking of Eastern's property and, therefore, violated the Takings Clause of the Fifth Amendment. *Id.* at 522-538. Justice Kennedy authored an opinion that concurred in part and dissented in part with Justice O'Connor's opinion. Justice Kennedy rejected the plurality's Takings Clause analysis, but held that Coal Act violated the Due Process clause of the Fifth Amendment. *Id.* at 539-550. Justice O'Connor's and Justice Kennedy's opinions make clear that Congress may constitutionally impose retroactive liability in some circumstances, but not where the statute imposes "severe retroactive liability on a limited class of parties that could not have anticipated the

liability, and the extent of the liability is substantially disproportionate to the parties' experience." *Eastern Enterprises*, 524 U.S. at 528-529. (O'Connor, J.); *see also id.* at 548-549 (Kennedy, J.).

In her opinion, Justice O'Connor explained that the imposition of liability on Eastern constituted a taking because it imposed a considerable financial burden on Eastern and because Eastern could not have contemplated that it might be liable for the provision of lifetime healthcare benefits to miners and their dependants because it never signed the 1974 or later CWAs. *Id.* at 529-531. Justice O'Connor reasoned that Congress' solution to the problem of funding coal miners health benefits, while "understandable," impermissibly "singled out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused. . . ." *Id.* at 537. Justice O'Connor concluded "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised." *Id.* Justice Kennedy similarly characterized the Coal Act's burden on Eastern as having "a retroactive effect of unprecedented scope." *Id.* at 549.

All five Justices who formed the majority were fully aware of Eastern's ownership and active involvement in the operation of a subsidiary, EACC, that signed the 1974 and later CWAs, and therefore promised lifetime healthcare benefits. Nontheless, the plurality opinion and Justice Kennedy's opinion both stressed that Eastern was not responsible for creating any expectation of lifetime benefits because it did not sign the 1974 CWA or any subsequent CWA that promised such benefits. *Id.* at 550. Justice Kennedy noted that Eastern was not responsible "for the

perilous financial condition of the 1950 and 1974 plans which put the benefits in jeopardy." *Eastern Enterprises*, 524 U.S. at 550. Justice O'Connor similarly noted that Eastern's liability bore no relationship to its ownership of EACC, and Justice Kennedy ignored the existence of EACC entirely. Thus, the Justices who formed the majority in Eastern treated Eastern's relationship with EACC - a post-1974 signatory - as constitutionally insignificant, *i.e.*, they declined to conclude that common ownership with a post-1974 signatory was enough to justify retroactively imposing liability on Eastern for miners it employed almost 30 years earlier. *Id.* at 530, 547-550.

C. Facts Relating to the Commissioner's Assignments to the Companies

The Commissioner assigned responsibility to the Companies for numerous miners and dependents pursuant to the third tier of the assignment scheme. 26 U.S.C. § 9706(a)(3). The assigned miners did not work for any of the Companies. Instead, they worked for entities that no longer existed, but were related persons to the Companies. These relationships can be summarized as follows:

1. Shenango. The Commissioner assigned miners to Shenango who had last worked for Lucerne Coke Company. Lucerne was merged into Shenango in 1971. Lucerne last signed a CWA in 1971, which expired in November 1974.

2. Stelco USA and Stelco Coal. The Commissioner assigned miners to Stelco USA and Stelco Coal who had last worked for Mather Collieries, which permanently ceased operating sometime before 1964.

Mathers Collieries, which was owned in relevant part by Stelco Coal, last signed a CWA in 1959.

3. Mueller. The Commissioner assigned miners to Mueller who had last worked for Joanne Coal Company. Mueller obtained Joanne Coal through a merger with Joanne Coal's parent corporation in 1980. Joanne Coal last signed the 1964 CWA.

Each of the Companies also is a related person to one or more other entities, some of whom did sign 1974 or later CWAs. These relationships can be summarized as follows:

1. Shenango. Shenango shared common ownership with Aloe Coal Company in 1992. Aloe signed 1974 and later CWAs.

2. Stelco USA, Inc. and Stelco Coal Company. Stelco USA, Inc. and Stelco Coal Company shared common ownership in 1992 with Pikeville Coal Company. Pikeville signed the 1974 and later CWAs.

3. Mueller Industries, Inc. Mueller Industries, Inc. shared common ownership in 1992 with United States Fuel Company. United States Fuel signed 1974 and later CWAs.[2]

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[2] Lucerne Coke Company, Mather Collieries and Joanne Coal Company will be collective referred to as the "pre-1974 Signatories." Aloe Coal Company, Pikeville Coal Company, and United States Fuel Company will be collectively referred to as the "post-1974 Signatories."

Nonetheless, the Companies' relationships with the post-1974 Signatories did not influence the Commissioner's assignments of miners to the Companies.[3] To the contrary, the Commissioner made the disputed assignments based solely on the pre-1974 signatory status of the operators who had employed the miners, *i.e.* based solely on the pre-1974 signatory status of Lucerne Coke Company, Mathers Collieries, and Joanne Coal Company.

D. The Commissioner's Response to *Eastern Enterprises*

After *Eastern Enterprises*, the Commissioner undertook a comprehensive review of all of the assignments that had previously been made under Section 9706(a)(3), including those made to the Companies. For the first time, the Commissioner considered the signatory status of related persons and concluded that, if neither the signatory operator nor a related person had signed a 1974 or later CWA, then the assignment should be voided. Using this rationale, the Commissioner voided thousands of assignments.

The Commissioner took a different position where, as here, the "controlled group of corporations" that made up a group of related persons under the Coal Act also included entities that had signed post-1974 CWAs. Despite a well-established policy of not considering the signatory status of related persons when making assignments, the Commissioner effectively imputed the post-1974 signatory status of one related person to the entire group of related persons to conclude that the group should be treated collectively as a

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[3] Assignments to the post-1974 Signatories are not in dispute in this case.

post-1974 signatory. Accordingly, the Commissioner refused to void the Companies' assignments under *Eastern Enterprises*.

E. The Decision Below

The Court of Appeals upheld the Commissioner's assignments despite *Eastern Enterprises*. In essence, the Court concluded that the Companies' status under the Coal Act as related persons to the post-1974 Signatories materially distinguished them from Eastern and also rendered the assignments permissible under the Fifth Amendment. In so doing, the Court, like the Commissioner, used the Coal Act's related person provision to impute post-1974 signatory status - and with it the required promise of lifetime healthcare benefits - to the pre-1974 Signatories, who had employed the miners under CWAs that indisputably did not promise any lifetime healthcare benefits whatsoever.

REASONS FOR ALLOWANCE OF THE WRIT

The decision in *Eastern Enterprises* prohibits the imposition of severe retroactive liability for retired miners where the operator did not sign a CWA that promised them lifetime healthcare benefits. Although there is no dispute that neither the Companies nor the operators who had employed the retired miners at issue here promised them lifetime healthcare benefits, the Commissioner and the lower Court imputed such a promise to the Companies from their common ownership in 1992 with the post-1974 Signatories (which common ownership rendered them related persons under the Coal Act). Common ownership in 1987 with a post-1974 signatory, however, was not enough to justify the imposition of liability in *Eastern Enterprises*. Therefore, the Commissioner and the lower Court changed the constitutional

inquiry from whether the miners were employed under a CWA that promised lifetime healthcare benefits, to whether the Coal Act supplies such a promise by the status it imposes on common ownership in 1992. This change wrongly alters the constitutional inquiry required by *Eastern Enterprises* and wrongly deprives the Companies of the benefit of this Court's decision in that case.

The arguments raised in the Companies' Petition are substantially the same as those raised by the Petitioners in *Berwind Corporation v. Barnhart*, No. 02-995 and *A.T. Massey Coal Company, Inc. v. Barnhart*, No. 02-955. For the sake of brevity, those same arguments are incorporated by reference. In addition, however, the Companies also offer the following supplemental argument.

There is no dispute that, but for the Companies' common ownership in 1992 with the post-1974 Signatories, the Companies would be substantially the same as Eastern. In addition, there is no dispute that Eastern shared common ownership with a post-1974 signatory (EACC), and that fact could not justify the severe retroactive liability that the Coal Act imposed on Eastern. Thus, the only difference between the Companies and Eastern is that the Companies shared common ownership with post-1974 Signatories in 1992, whereas Eastern severed its common ownership with a post-1974 signatory five years earlier.

The Commissioner and the lower Courts make much of fact that, under the Coal Act, common ownership in 1992 made the Companies related persons to the post-1974 Signatories, whereas, by happenstance, the Coal Act did not characterize the exact same relationship in 1987 as one of related persons. Consequently, the difference between the

Companies and Eastern is not really factual in nature, but how the Coal Act treats essentially the same facts.

The Commissioner and the lower Court are not claiming that sharing common ownership in 1992, rather than 1987, has some constitutional significance. Instead, they are claiming that the happenstance of sharing common ownership with a post-1974 Signatory in 1992, rather than 1987, triggers a provision of the Coal Act which, in turn, permits them to treat commonly owned entities as related persons and, thereby, impute a post-1974 signatory's promise of lifetime healthcare benefits to a pre-1974 signatory who indisputably did not make such a promise. Thus, the Commissioner and the lower Court are using the terms of the Coal Act to create a fiction, which they then use to validate the imposition of severe retroactive liability that, otherwise, would be struck down under *Eastern Enterprises*.

The issue, then, is whether the terms of the Coal Act can make constitutional what otherwise would be struck down under *Eastern Enterprises*. The answer is and must be no. Under *Eastern Enterprises,* the constitutional validity of retroactive liability turns on the degree of retroactivity and whether the liability is proportional to the employer's experience with the 1974 and later CWAs that promised lifetime benefits. Thus, the constitutional inquiry turns on the operator's actual conduct, and not that of other commonly owned entities. This point was made clear in *Eastern Enterprises,* where the Court was not persuaded that Eastern's ownership of EACC – a post-1974 signatory – justified imposing severe retroactive liability for miners employed under CWAs that did not promise lifetime healthcare benefits.

Neither the Commissioner nor the lower Court can argue that common ownership in 1992 has some constitutional

significance. Instead, they bootstrap the constitutional issue into a statutory one by claiming that the imposition of liability is constitutional because the Coal Act says it is, *i.e.*, because the Coal Act says they can treat the pre-1974 Signatories as post-1974 Signatories.

This is simply another way of describing the very approach that was rejected in *Eastern Enterprises*. In that case, the Coal Act said that liability could be imposed on pre-1974 signatories, but this Court struck down the imposition of liability because it was based on employment under CWAs that did not promise lifetime healthcare benefits.

The same is true here. Regardless of what labels the Coal Act puts on the Companies' common ownership with the post-1974 Signatories, the fact remains that they did not promise their miners lifetime healthcare benefits. This fact was crucial in *Eastern Enterprises*, and it has no less significance here.

The opinions of Justice O'Connor and Justice Kennedy in *Eastern Enterprises* bear out this point. In their opinions, they emphasized that the imposition of liability for retired miners was unconstitutional due to the unwarranted burden and severe retroactivity it placed on Eastern, and not the method by which the statute accomplished the unconstitutional result. Justice O'Connor noted "[a]lthough EACC continued mining coal until 1987 as a subsidiary of Eastern, Eastern's liability under the Act bears no relationship to its ownership of EACC; the Act assigns Eastern responsibility for benefits relating to the miners that Eastern itself, not EACC, employed while EACC would be assigned the responsibility for any miners that it had employed." *Eastern Enterprises*, 524 U.S. at 530. Similarly, the issue here is not the liability for the miners employed by the post-1974 Signatories.

Rather, as in *Eastern Enterprises,* the Companies are being held liable for healthcare benefits for miners who were employed under CWAs that did not promise lifetime healthcare benefits.

In short, the Commissioner and the lower Court have concluded that the constitutional inquiry under *Eastern Enterpirses* turns on what the Coal Act says, and not the degree of retroactivity or the proportionality of imposing liability on operators that did not promise lifetime healthcare benefits. As such, the Commissioner and the lower Court wrongly altered the required constitutional inquiry and deprived the Companies of the benefits of this Court's decision in *Eastern Enterprises*.

CONCLUSION

For the foregoing reason, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2525

[Filed December 23, 2002]

SHENANGO INCORPORATED; STELCO USA, INC.; STELCO COAL COMPANY; MUELLER INDUSTRIES, INC., Appellants	)
v.	)
KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; GAIL R. WILENSKY, Trustees of the United Mine Worker of America Combined Benefit Fund	)

SUR PETITION FOR PANEL REHEARING

BEFORE: SLOVITER, NYGAARD, McKEE, Circuit Judges

The petition for rehearing filed by the Appellants in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other

available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for panel rehearing is hereby **DENIED**.

IT IS SO ORDERED.

By the Court,

/s/ _____
Hon. Theodore A. McKee
Circuit Judge

DATED: December 23, 2002

clc/cc: DJL
PB
JC

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2525

[Argued September 19, 2001
Filed September 24, 2002]

SHENANGO INCORPORATED; STELCO USA, INC.; STELCO COAL COMPANY; MUELLER INDUSTRIES, INC.,
Appellants

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; GAIL R. WILENSKY, Trustees of the United Mine Worker of America Combined Benefit Fund

On Appeal from the United States District Court
for the Western District of Pennsylvania
(Civil Action No. 99-1035)
District Judge: Hon. Robert J. Cindrich

JUDGES:
Before: SLOVITER, NYGAARD and McKEE, Circuit Judges.

OPINION

McKEE, Circuit Judge.

Shenango, Inc., Stelco USA, Inc., Stelco Coal Co. and Mueller Industries (hereinafter collectively referred to as the "Companies") challenge the Commissioner of Social Security's assignment of responsibility for health care premiums of approximately 70 retired miners and their qualified dependents pursuant to the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. § § 9701-9722. The Companies argue that the Act is unconstitutional as applied to them pursuant to *Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1988). For the reasons that follow, we conclude that the assignments are not unconstitutional as applied, and that the district court did not err in dismissing the Companies' challenge to the assignments. However, before we explain our reason, it will be helpful to explain the historical background and context of this dispute.

I. THE COAL ACT

The Coal Act was enacted in 1992 "to ensure that retired coal miners and their dependents would continue to receive the health and death benefits they had been receiving since the 1940s pursuant to a series of collective bargaining agreements." *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 163-64 (3d Cir. 1999). Because the origins and history of the Coal Act are set forth in great detail in the

Supreme Court's opinion in Eastern Enterprises, as well as in our opinions in *Unity Real Estate v. Hudson*, 178 F.3d 649 (3d. Cir. 1999), and Anker Energy, we need not repeat it here. Rather, we offer the following narrative from our opinion in Anker Energy as background for our analysis:

> In 1947, the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association ("BCOA") agreed upon the first of a series of National Bituminous Coal Wage Agreements ("NBCWA" or "wage agreement"), which specified the terms and conditions of employment and provided health and pension benefits for miners. The 1947 NBCWA established the United Mine Workers of America Welfare and Retirement Fund [W&R Fund], which used the proceeds of a royalty on coal production to provide pension and medical benefits for miners and their families. The 1947 NBCWA did not specify the benefits to which miners and their families were entitled, instead leaving this task to three trustees in charge of the Fund. In 1950 the union and the industry association agreed upon a new NBCWA that created a new Fund financed by a per ton levy on coal mined by signatory operators. Like the 1947 Fund, the 1950 version did not promise specific benefits, and the benefits were always subject to cancellation or change.

This system did not change significantly until 1974 when, to comply with the newly enacted [Employee Retirement Income Security Act], the UMWA and the BCOA negotiated a new wage agreement that created four trusts funded by royalties on coal production and premiums based on hours worked by miners. Under the new agreement, the 1950 Benefit Plan covered miners who retired before January 1, 1976, and their dependents, while the 1974 Benefit Plan covered miners who retired after 1975 and their dependents. Both Plans provided nonpension benefits, including medical benefits.

The 1974 NBCWA explained that it was amending the previous system to provide health benefits for retired miners "for life," and to their widows until death or remarriage. Because of this broadened coverage the number of eligible benefit recipients increased dramatically, and the Plans began losing money.

In response, the 1978 NBCWA assigned responsibility to signatory employers for the health care of their own active and retired employees. The 1978 agreement also restricted the 1974 Plan so that it would provide health benefits only for "orphaned" retirees, those whose last employer had gone out of business or otherwise ceased contributing to the Plans. To ensure the Plans' solvency, the 1978

> NBCWA included a "guarantee" clause that obligated signatories to make sufficient contributions to maintain benefits during that agreement, and the union and operators amended the Plans to include "evergreen clauses" that required signatories to contribute to the Plans if they remained in the coal business even if they never signed another wage agreement.
>
> Despite the 1978 NBCWA and subsequent attempts to improve the Plans, they continued to lose money because of the increase in beneficiaries, the escalating costs of health care, and the flood of signatory companies abandoning the Plans. In 1992 Congress responded by passing the Coal Act.

177 F.3d at 164-165.

In enacting the Coal Act, Congress declared that the Act was intended to remedy problems with funding retiree health benefits in the coal industry, to allow for sufficient operating assets for the health benefit plans, and to provide for the continuation of a privately funded and self-sufficient program for the delivery of health care benefits to retired miners and their dependents. Pub.L. No. 102-486, § 19142(b), 106 Stat. 3036, 3037 (1992), 26 U.S.C. § 9701 note. Accordingly, the Act required certain benefit plans previously established under the UMWA collective bargaining agreements to be merged into a new plan-- the United Mine

Workers of America Combined Benefit Fund.[1] 26 U.S.C. § 9702(a). The Combined Fund provides health and death benefits to retired coal miners and dependents who, as of July 20, 1992, were eligible to receive, and were receiving, benefits under the UMWA 1950 or 1974 benefit plans. 26 U.S.C. § § 9703(a), (b)(1), (c), (e) & (f). Benefits paid through the Combined Fund are funded in part by premiums imposed on "signatory coal operators," i.e., certain coal operators that employed an eligible beneficiary and had signed a collective bargaining agreement between the UMWA and BCOA, a multiemployer group of coal producers, or other "related persons" connected to the signatory operator by common ownership or control. See 26 U.S.C. § § 9701(c)(1) & (c)(2), 9704, 9706.

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[1] The Combined Fund is one of three components formulated by Congress to achieve the purposes of the Coal Act. The second component is the mandated continuation of individual employer health plans maintained by signatories to the 1978 and later NBCWAs. 26 U.S.C. § 9711. The third component is the 1992 Plan which provides benefits for persons who, but for the enactment of the Coal Act, would have been eligible to receive benefits from the UMWA 1950 or 1974 benefit plans, but who are not eligible for benefits from the Combined Fund. It also provides benefits for persons who are entitled to receive benefits directly from their former employers but who do not in fact receive such benefits. 26 U.S.C. § 9712. The second and third components are not implicated in this appeal. We are only concerned with the Combined Fund.

The Act directs the Commissioner of Social Security[2] to assign each individual beneficiary to one of these signatory coal operators or its "related person." The assignment is determined by the length of the beneficiary's service, the date of service, and whether the employer signed national collective bargaining agreements with the UMWA in 1978 or later. 26 U.S.C. § 9706(a). The Act establishes a three tier mechanism for making assignments that we have described as the "linchpin" of the Coal Act's statutory scheme. *Unity Real Estate Co. v. Hudson*, 178 F.3d at 654. The Act provides in relevant part:

> (a) In general.--For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
>
> (1) First, to the signatory operator which--
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage

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[2] Originally, the Coal Act provided that the Secretary of Health and Human Services would be responsible for the assignment of Combined Fund beneficiaries. The Secretary delegated this task to the Commissioner of Social Security. In 1994, Congress transferred the statutory responsibility directly to the Commissioner. See Social Security Independence and Program Improvements Act of 1994, Pub.L.No. 103-296, § § 105(a)(2)(A), 108(h)(9)(A), 108 Stat. 1472, 1487-88 (1994).

> agreement, and (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
>
> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which–
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
>
> (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. § 9706(a)(1), (2) & (3). Once the Commissioner makes the assignment under § 9706, the assignee must then pay the annual premiums to the Combined Fund based on the amounts required to provide health and death benefits for the assigned beneficiaries.

If a miner or his[3] dependents cannot be assigned under this scheme, his benefits are funded by either asset transfers from one of the Combined Fund's predecessor benefit plans, see 26 U.S.C. § 9705(a)), transfers from the U.S. Treasury's Abandoned Mine Land Reclamation Fund, see 26 U.S.C. § 9705(b), 30 U.S.C. § 1232(h); or, if those sources are insufficient or unavailable, an additional unassigned -- or "orphaned" -- retiree premium that the Act imposed on all signatory operators. See 26 U.S.C. §§ 9704(d), 9705(a)(3)(B), 9705(b)(2).

The Coal Act also contains several provisions that, taken together, treat a commonly controlled group of related corporations as a single employer for purposes of liability under the statute. Pursuant to those provisions, the original employer and a wide range of affiliated companies or successors are potentially liable for premiums on miners' benefits under the Act. The Commissioner can assign responsibility for paying premiums for a miner's benefits either to a mine operator that actually employed an eligible beneficiary and signed a collective bargaining agreement between the UMWA and the BCOA ("signatory operator"), or to any "related person." 26 U.S.C. § 9706(a). The Act defines "related person" to include all members of a commonly controlled group of corporations including the signatory, other businesses under common control with the signatory, and subsequent successors in interest to any of those affiliated entities. 26 U.S.C. § 9701(c)(2)(A)). A

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[3] Inasmuch as it is highly unlikely that any women were employed as miners during the relevant period, we will use the masculine pronouns in referring to all miners.

"controlled group" is in turn defined as a group of companies in which a common parent or concentration of individual economic interests owns or controls more than 50% of each of the affiliated companies. See 26 U.S.C. § 9701(c)(2)(A), incorporating by reference 26 U.S.C. § 52(a) & (b), which in turn incorporates by reference 26 U.S.C. § 1563(a). The determination of which entities are "related persons" under the Coal Act turns on an entity's status with regard to the miner or the miner's employer as of July 20, 1992. 26 U.S.C. § 9701(c)(2)(B).

"Related persons" have broad and shared responsibility for premiums. Under the Act, any company within the commonly controlled group may be treated as having employed a related signatory's miners. 26 U.S.C. § 9706(b). In addition, related persons are "jointly and severally liable for any premium required to be paid" by its affiliated signatory operator. 26 U.S.C. § 9704(a). Congress instructed the Commissioner to promptly assign miners to various companies according to this three tiered scheme promptly after the Coal Act's 1992 enactment. The statute states: "For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator . . . ." 26 U.S.C. § 9706(a).

II. THE COMMISSIONER'S ORIGINAL ASSIGNMENTS

The Companies were collectively assigned responsibility for premiums for approximately 70 miners and qualifying dependents pursuant to the third tier of the assignment scheme. 26 U.S.C. § 9706(a)(3). The

Companies did not employ any of the miners thus assigned. Rather, the Commissioner assigned the miners based upon the Companies' relationships to other entities that had employed the miners.[4]

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[4] The exact relationship between each plaintiff and its related entities is as follows:

> Shenango merged with Lucerne Coke Co. sometime after 1971. Lucerne last signed an NBCWA in 1971. That agreement expired in November, 1974. Lucerne employed the miners assigned to Shenango, but Lucerne is no longer in business. However, as of July 20, 1992, Shenango was related, via its parent company, to Aloe Coal Co. which signed NBCWAs in 1974 and later.
>
> Stelco Coal Co. mined coal under the name of Mather Collieries, which permanently ceased operating sometime before 1964. Stelco USA, Inc., is commonly owned with Stelco Coal Co. Mather signed several NBCWAs. It signed the last one in 1959. Mather employed the miners assigned to Stelco Coal and Stelco USA. As of July 20, 1992, Stelco Coal and Stelco USA were related to Pikeville Coal Company, which signed the 1974 and subsequent NBCWAs.
>
> In December, 1980, Mueller Industries, Inc., merged with Sharon Steel Corp., Sharon had previously merged with Joanne Coal Co., and Joanne Coal continued mining until approximately 1969. Joanne Coal last signed a NBCWA in 1964. Joanne Coal employed the miners assigned to Mueller. As of July 20, 1992, Mueller was related

The Commissioner originally assigned liability on the grounds that the Companies were "related" to a now-defunct employer that had signed a pre-1974 NBCWA. Specifically, Mueller was assigned liability with respect to employees of Joanne Coal because Joanne Coal signed a 1964 wage agreement. Then, Joanne Coal merged with Sharon Steel which subsequently merged with Mueller. Shenango received assignments with respect to employees of Lucerne Coke, an employer that signed a 1971 wage agreement and later merged with Shenango. Stelco USA and Stelco Coal received assignments with respect to employees of Mather Colliers because Mather signed a 1959 wage agreement. Stelco Coal mined coal under the name of "Mather". Stelco USA and Stelco Coal are commonly owned.

The Commissioner's assignments to Stelco Coal and Shenango were made before October 1, 1993. The assignments to Mueller Industries, Inc., were made sometime after that date.

The Companies concede that they are "related persons" as defined in the Act, 26 U.S.C. § 9701(c)(2)(A). They concede that they are related to the coal companies that actually employed the miners assigned to the Companies, signed pre-1974 NBCWAs and that are now out of business. They also concede that they are related to the coal companies that employed an entirely different set of miners and that signed post-1974 NBCWAs. The Companies differentiate

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to Carpentertown Coal & Coke Co., and to United States Fuel Co. Carpentertown Coal signed the 1978 NBCWA and later NBCWAs.

between these two groups by referring to them as "Pre-1974 Signatories" and "Post-1974 Signatories."

III. EASTERN ENTERPRISES AND THE COMMISSIONER'S RESPONSE

As is often the case under the Coal Act, the challenge to the Commissioner's assignments here rests in large part upon our interpretation of Eastern Enterprises . The Court there considered the constitutionality of the Coal Act as applied to Eastern. That company had mined coal until 1965, and signed every NBCWA from 1947 until 1964. The Commissioner assigned Eastern liability for over 1000 miners pursuant to 26 U.S.C. § 9706(a)(3), based upon Eastern's status as the pre-1978 signatory operator for whom the miners had worked the longest. The total liability for those assignments was estimated to be between $50 and $100 million. Eastern sued claiming that § 9706(a)(3) was unconstitutional as applied to it because the Act's imposition of liability violated the Due Process and Takings Clauses of the Fifth Amendment.

A four-justice plurality of the Supreme Court agreed that the Act violated the Takings Clause as applied to *Eastern Enterprises*. *Eastern Enterprises*, 524 U.S. at 537. While recognizing that a takings analysis is "essentially ad hoc and fact intensive," the plurality nonetheless identified three factors that are usually significant to assessing a Takings challenge under the Fifth Amendment: "the economic impact of the regulation, its interference with investment backed expectations, and the character of the governmental action." *Id.* at 523-524 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979)).

The plurality then reviewed cases involving legislative schemes similar to the Coal Act; viz., the Black Lung Benefits Act and the Multiemployer Pension Plan Amendments Act ("MPPAA") which was enacted to supplement the Employee Retirement Income Security Act ("ERISA"). The justices concluded that those cases established:

> Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress may also impose retroactive liability to some degree, particularly where it is confined to short and limited periods required by the practicalities of producing national legislation. Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

524 U.S. at 528-529 (citation and internal quotations omitted) (emphasis added).

Applying these principles to Eastern Enterprises, the plurality first focused on the economic impact of the Act and found that it placed a "considerable financial burden" on that company. *Id.* at 529. The financial burden was not a "permanent physical occupation of Eastern's property of the kind [usually] viewed as a per se taking[.]" However, the

plurality noted that the Court's decisions upholding the MPPAA "suggest that an employer's statutory liability for multiemployer pension plans should reflect some proportionality to its experience with the plan." *Id.* at 530 (citation and internal quotations omitted). The plurality concluded that this proportionality was lacking insofar as the Coal Act was applied to Eastern. Eastern had contributed to the 1947 and 1950 W&R Funds, but "it [had] ceased it coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the 1974, 1978, or subsequent NBCWAs." *Id.* This was significant because those latter agreements were the "first [to] suggest an industry commitment to funding lifetime health benefits for both retirees and their family members." *Id.* Thus, because Eastern had neither contemplated liability for lifetime benefits to miners nor contributed to the miners' expectations of lifetime benefits, the plurality found that "the correlation between Eastern and its liability to the Combined Fund is tenuous, and the amount assessed against Eastern resembles a calculation made in a vacuum." *Id.* at 531 (citation and internal quotations omitted).

The assignments to Eastern faired no better when the plurality considered the second and third factors it had culled from the Court's Takings Clause jurisprudence. The Act's "substantial and particularly far reaching" retroactivity[5]

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[5] Coal Act assignments operate retroactively because they require an assignee to use current funds to provide benefits for miners after the assignee believed its liability to the miners had been settled. See Eastern Enterprises, at 534 (O'Connor, J.) ("The Coal Act operates retroactively, divesting Eastern of property long after the company believed its liabilities under the 1950 W&R Fund

interfered with Eastern's reasonable investment backed expectations. *Id.* at 534. The plurality reasoned that a coal industry employer could not have contemplated liability for lifetime benefits to miners until those provisions were included in the 1974 NBCWA. Therefore, "the Coal Act's scheme for allocation of Combined Fund premiums was not calibrated either to Eastern's past actions or to any agreement -- implicit or otherwise -- by the company." *Id.* at 536. Finally, the plurality found that the "nature of governmental action . . . is quite unusual," and "implicates fundamental principles of fairness underlying the Takings Clause," because it "singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused." *Id.* at 537.

Inasmuch as each of the three factors weighed against sustaining the "taking," the plurality concluded that the assignment to Eastern under the Act was unconstitutional.

Justice Kennedy, who provided the fifth vote striking down the application of the Act as to Eastern, disagreed with the plurality's analysis, but found that the Act's retroactivity violated due process. *Id.* at 539-50. He applied an "arbitrary and irrational" standard of review, *Id.* at 547, and focused on the fact that Eastern Enterprises had not signed a 1974 or later NBCWA. He concluded:

> Eastern was once in the coal business and employed many of the beneficiaries, but it was

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to have been settled.").

> not responsible for their expectation of lifetime benefits or for the perilous condition of the 1950 and 1974 plans which put the benefits in jeopardy. As the plurality discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business. Eastern was not responsible for the resulting chaos in the funding mechanism caused by other coal companies leaving the framework of the National Bituminous Coal Wage Agreement. This case is far outside the bounds of retroactivity permissible under our law.

Id. at 550 (emphasis added).

The four dissenting justices agreed with Justice Kennedy that the application of the Act did not violate the Takings Clause, but disagreed with his view that the Act violated due process. *Id.* at 556-67.

We have previously noted the "splintered nature" of the Court's decision, and remarked that it is "difficult to distill a guiding principle from Eastern." *Unity Real Estate Co.*, 178 F.3d at 658. However, as recited above, both the plurality and Justice Kennedy focused on one fact which each considered significant. The 1974, 1978 and subsequent NBCWAs were the first wage agreements containing a commitment to fund lifetime health benefits for retired miners and their dependents. Eastern Enterprises had not signed either the 1974 or the 1978 NBCWAs. Therefore, it could not have contemplated contributing to the miners' expectation of lifetime health benefits. See *Anker Energy Corp. v.*

Consolidation Coal Co., 177 F.3d at 172 ("Analysis of the decisions in Eastern Enterprises leads us to the conclusion that a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while application of the Act to a signatory to the 1974 or subsequent wage agreement would be an entirely different matter."); see also, *Association of Bituminous Contractors, Inc. v. Apfel*, 332 U.S. App. D.C. 218, 156 F.3d 1246, 1257 (D. C. Cir. 1998) ("The clear implication of each opinion in Eastern Enterprises is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary")).

After Eastern Enterprises, the Commissioner undertook a comprehensive review of all assignments that had previously been made under § 9706(a)(3), including those made to the Companies. The Commissioner reasoned that, under Eastern Enterprises, if neither the original employer nor related persons had signed the 1974 or later NBCWAs, the assignment could not be distinguished from Eastern Enterprises. Accordingly, the Commissioner, on his own initiative, voided hundreds of assignments that were based solely on an employer or related person's participation in a pre-1974 NBCWA.

However, the Commissioner also concluded that Eastern Enterprises allowed miners to be assigned to coal companies that where part of a controlled group of corporations that included entities that had signed post-1974 NBCWAs. These assignments were deemed to be materially

different from the assignments in Eastern Enterprises. The plaintiff in Eastern was not statutorily related to another company that had signed 1974 and later NBCWAs. The Commissioner therefore concluded that Eastern did not address circumstances in which the assignee is related to both the original employer and another, affiliated company that signed collective bargaining agreements promising lifetime care. Accordingly, the Commissioner rejected the Companies' requests to vacate their assignments of the miners employed by the Pre-1974 Signatories.

IV. DISTRICT COURT PROCEEDINGS

On June 30, 1999, the Companies filed a five Count complaint against the Commissioner and the Trustees of the Combined Fund. In Count I, the Companies alleged that the Commissioner's refusal to vacate the Coal Act assignments of liability for miners employed by the Pre-1974 Signatories was unlawful under Eastern Enterprises. In Counts II and III, the Companies alleged that the Coal Act violates the Takings and Due Process Clauses of the Fifth Amendment as it applies to them. In Count IV, the Companies challenged the Commissioner's authority to make any assignments after September 30, 1993. In Count V, the Companies argued that because the Commissioner's assignments should be vacated for the reasons stated in the preceding four Counts, the Combined Fund is obligated to return all premium payments together with interest.

After engaging in an excellent and well-reasoned analysis, the district court granted the Commissioner's motion to dismiss Counts I through IV. Thereafter, the parties submitted their Joint Statement of Position informing the

district court that the parties agreed that, given its dismissal of Counts I through IV, Count V was moot. Accordingly, the district court dismissed Count V as moot, and this appeal followed.[6]

V. DISCUSSION

The Companies assert two basic arguments. First, they argue that their position is essentially identical to the position of the plaintiff in Eastern Enterprises insofar as the Pre-1974 Signatories are concerned. The Companies claim that the Commissioner therefore violated the Due Process Clause in assigning them miners employed by the Pre-1974 Signatories. Second, they argue that the Commissioner exceeded his authority under § 9706(a) because he made some assignments after October 1,1993; the "cutoff" that Congress mandated in the Act. We will address each argument separately.

A. Are the Companies in a Substantially Identical Position to Eastern Enterprises?

As noted earlier, no single rationale emerges from the decision in Eastern Enterprises. Accordingly, " 'the holding

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[6] We review de novo the district court's decision as to the constitutionality of the Coal Act as applied to the *Companies*. *Anker Energy Co. v. Consolidation Coal Co.*, 177 F.3d at 169. Although the district court granted the Commissioner's motion to dismiss under Fed. R. Civ. P. 12(b)(6), the parties apparently submitted documents outside the pleadings themselves; therefore the appropriate standard of review is the same as that for a motion for summary judgment, i.e., plenary review. *Smith v. Johns-Manville Corp.*, 795 F.2d 301, 306 (3d Cir. 1986).

of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977) (quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n.15, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976)). The Marks rule is only applicable where "one opinion can be meaningfully regarded as 'narrower' than another" and can "represent a common denominator of the Court's reasoning." *Rappa v. New Castle County*, 18 F.3d 1043, 1057 (3d Cir. 1994) (quoting *King v. Palmer*, 292 U.S. App. D.C. 362, 950 F.2d 771, 781 (D.C. Cir. 1991)(en banc). "Where approaches differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court." *Anker Energy Corp.*,177 F.3d at 170 (citing *Rappa v. New Castle County,* 18 F.3d at 1058).

In Unity Real Estate, we stated that "Justice Kennedy's substantive due process reasoning is not a 'narrower' ground that we might take to constitute the controlling holding." 178 F.3d at 658. Consequently, the only binding aspect of the fragmented decision in Eastern Enterprises is its "specific result," i.e., the Act is unconstitutional as applied to *Eastern Enterprises*. *Anker Energy Corp.*, 177 F.3d at 170 (citing *Association of Bituminous Contractors, Inc. v. Apfel*, 332 U.S. App. D.C. 218, 156 F.3d 1246, 1255 (D.C. Cir. 1998)). Or, as we said in Unity Real Estate: "Eastern . . . mandates judgment for the plaintiffs only if they stand in a substantially identical position

to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence."[7] 178 F.3d at 659.

Earlier, we noted that the Companies concede that under the Coal Act, they are "related persons" to two sets of entities, which they call the "Pre-1974 Signatories" and the "Post-1974 Signatories." Because of their "related person" status to the Post-1974 Signatories, the Companies were assigned premium liability for miners employed by the Pre-1974 Signatories.

The Companies concede that any assignments of Coal Act liability based on their status of being related persons to Post-1974 Signatories are constitutionally valid. Companies' Br. at 8. However, the Companies argue that they "stand in a substantially identical position to Eastern [regarding the pre-1974 Signatories] because, as in Eastern, all of the disputed miners worked for signatory operators who last signed [NBCWAs] before 1974." *Id.* at 9. In the Companies' view, the Pre-1974 Signatories and the Post-1974 Signatories are two discrete sets of entities that must be viewed differently under Eastern Enterprises. Therefore, according to the Companies, the constitutionality of the Coal Act as applied to any particular member of a controlled group of corporations depends upon whether the particular member signed a 1974 or later NBCWA, not upon whether any other member of the group did so. The Companies rely upon our decision in Unity Real Estate in claiming that their substantial identity to the

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[7] We also held in Unity Real Estate that because of the concurrence and dissent in Eastern Enterprises, "we are bound to follow the five-four vote against the takings claim. . . ." 178 F.3d at 659; see also *Anker Energy Corp.*, 177 F.3d at 170 n.3.

Pre-1974 Signatories places them (the Companies) in the shoes of Eastern Enterprises, and the Commissioner's assignments of the miners employed by the Pre-1974 Signatories was therefore unconstitutional as to them.

The Companies make no other constitutional challenge to the assignments regarding the Pre-1974 Signatories. Therefore, their "as applied" constitutional challenge turns on whether they are in a "substantially identical position to Eastern Enterprises" with regard to assignments of the Pre-1974 Signatories. We hold that the circumstances here are not substantially equivalent to the circumstances in Eastern Enterprises, and the Commissioner's assignment of the Pre-1974 Signatories was therefore not a violation of the Fifth Amendment. A closer examination of Eastern Enterprises shows why.

Eastern Enterprises began operations in 1929 and it mined coal in West Virginia and Pennsylvania until 1965. *Eastern*, 524 U.S. at 516. In that capacity, it was a signatory to each NBCWA executed between 1947 and 1964 and made contributions of over $60 million to the 1947 and 1950 welfare and retirement funds. *Id.* In 1963, Eastern decided to spin-off its coal operations to a subsidiary, Eastern Associated Coal Corp. ("EACC"). *Id.* The spin-off was completed by 1965, but Eastern retained its stock interest in EACC through a subsidiary corporation, Coal Properties Corp. ("CPC") until 1987, and it received dividends of more than $100 million from EACC during that period. *Id.*

After 1965, Eastern ceased coal mining operations and was not a signatory to the 1974 NBCWA, (which, as noted, was the first wage agreement to suggest an industry-wide

commitment to funding lifetime health benefits to miners and their dependents), or to any subsequent NBCWAs. *Id.* at 530. EACC signed the 1974 NBCWA as well as subsequent ones. However, in 1987, Eastern sold its interest in CPC to Peabody Holding Co., Inc. *Id* . at 516. As a consequence of that sale to that unrelated, third party, Eastern had divested itself of all of its interests in its EACC subsidiary five years before the enactment of the Coal Act.

After the enactment of the Coal Act, the Commissioner assigned Eastern the obligation for Combined Fund premiums for over 1,000 retired miners who had worked for Eastern before 1966, based on Eastern's status as the pre-1978 signatory operator for whom the miners had worked the longest as prescribed by § 9706(a)(3). *Id.* at 517. Eastern was not assigned responsibility for any miners who had been employed by EACC. *Id.* at 530.

From this recitation of the facts in Eastern, it is obvious that the Companies are not in a "substantially identical position to Eastern." Eastern was assigned premium liability under the Coal Act solely because it employed the assigned miners. Inasmuch as Eastern never signed a wage agreement committing to lifetime health benefits, it could not be charged with the cost of furnishing those benefits. See *Id.* at 531 ("The company's obligations under the Act depend solely on its roster of employees some 30 to 50 years before the statute's enactment, without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted."). Eastern did not involve liability under the Coal Act's "related person" provisions. In contrast, the Companies' liability here arises from their relationship to "related person" subsidiaries that signed a NBCWA in 1974

or thereafter. The Commissioner concluded that the nexus between the Companies and those related parties was sufficient to assign liability for miners' lifetime benefits even though none of the Companies signed a wage agreement obligating them to do so.

The Companies attempt to find shelter under the umbrella of Eastern Enterprises by stressing that Eastern also had a subsidiary, EACC, that signed a post-1974 NBCWA, and arguing that Eastern's relationship with EACC was not sufficient to sustain the Commissioner's assignments of Coal Act liability to Eastern. Companies' Br. at 15-16. However, that argument ignores a critical distinction. Eastern divested itself of EACC in 1987, five years before the enactment of the Coal Act. The Coal Act provides that where ostensibly related companies remain in business, the question of whether they are "related persons" within the meaning of the statute is determined with respect to their relationship as of a date shortly before the Act's enactment -- July 20, 1992. 26 U.S.C. § 9701(c)(2)(B). Because Eastern sold EACC before that date, EACC was not a "related person" to Eastern under the Act. Therefore, premium liability could not have been imposed on Eastern as a related person to EACC.

We have twice before held that liability based upon the Act's related person provisions removes an assignee from the shelter of Eastern Enterprises. In Unity, we upheld the constitutionality of the Coal Act as applied to a company that was a related person to both a pre-1974 NBCWA signatory and a post-1974 signatory. At the time the Commissioner made the premium assignments, Unity Real Estate Company was a small corporation closely-held by members of the Jamison family. Unity owned only a small commercial

building and a parking lot. It never mined coal and never signed a coal wage agreement. Nonetheless, the assignments to it were valid under the Coal Act because it was a related person to several, defunct coal mining companies that ultimately merged into Unity. Among those companies were South Union-PA and South Union-WVA. South Union-PA had mined coal since 1923 and signed NBCWAs from 1947 through 1961. South Union-WVA began mining coal when South Union-PA stopped and it signed the 1974, 1978 and 1981 NBCWAs.[8]

The Commissioner assigned Combined Fund premium liability to Unity for the miners formerly employed by all of Unity's related person entities pursuant to § § 9706(a)(1) & (2), and Unity challenged the assignment relying on Eastern. After a comprehensive analysis of the various opinions in Eastern, we upheld the Coal Act as applied to Unity and sustained all of the assignments, including assignments of those miners who had worked for South Union-PA. As noted earlier, South Union-PA had not signed a NBCWA in 1974 or thereafter. The critical distinction between Unity/the Jamison family and Eastern Enterprises was that Eastern never signed a 1974 or subsequent NBCWA and was not a related person to any entity that had. Unity, however was tethered to the commitment of lifetime benefits through South Union-WVA, its related person. That coal company had made such a commitment in the 1974, 1978 and 1981 NBCWAs. In affirming Unity's liability we stated:

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[8] A bankruptcy court granted it leave to reject the 1981 NBCWA.

> because the plaintiffs signed NBCWAs in 1974 and thereafter, they are factually distinguishable from Eastern Enterprises. Language in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974 support our conclusions.

178 F.3d at 659. That distinction "compelled the conclusion that Eastern is not on all fours with the case before us." *Id.*

Similarly, in Anker we upheld the Act's application to Anker coal via a related person that was a post-1974 signatory operator. We held that Anker's related person had agreed to the terms of the 1974, 1978, 1981 and 1984 NBCWAs and that "factually distinguished Anker's situation from that of Eastern Enterprises and compelled a finding that the Act [was] constitutional [as applied to Anker]." 177 F.3d at 172. There, from 1967 until 1982, Consolidation Coal had contracted with King Knob Coal for King Knob to mine coal on Consolidation's property. As part of this arrangement, King Knob agreed that its employees would be UMWA members and that it would be a signatory to the then current NBCWAs. To achieve that end, King Knob signed "me too" agreements in 1974, 1978, 1981 and 1984.[9]

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[9] A "me too" agreement is an agreement between an employer who is not a member of the BCOA but who agrees with the UMWA to be bound by the terms of the *NBCWA*. *Anker*, 177 F.3d at 166-7. A "me too" agreement has terms identical to the terms of the respective NBCWA. There is no legal distinction between the NBCWA itself, and the corresponding "me too" agreement insofar as the employer's rights and obligations are concerned. *Id.* at 172 n.4. Thus, the "distinction" between a

An affiliate of Anker acquired King Knob in 1975 and the relationship between Consolidation and King Knob continued until Consolidation canceled its contract with King Knob in 1982. In 1994 and 1995, the Commissioner informed Anker that it was a related person to King Knob and assigned premium liability to Anker for King Knob's retired miners. Anker sued alleging that under Eastern Enterprises the Commissioner's assignments were unconstitutional as applied to it.

Relying on Unity, we upheld the assignment. We concluded that Anker's related person had agreed to be bound by the terms of the post-1974 NBCWA's. Accordingly, Anker's situation "[fell] outside the specific holding of Eastern Enterprises." *Id* . at 172.

Here, not to be deterred by the wealth of precedent (seemingly on point) against them, the Companies press on and argue that Unity imposes a limitation on related person liability that precludes consideration of the bargaining history of any company other than the assigned miners' actual employer. They argue that because the assignments in Unity were made pursuant to § § 9706(a)(1) and (2), Unity was treated as if it stood in the shoes of the signatory operators who employed the miners and who had signed all of the NBCWAs through 1978. Therefore, the Companies claim that Unity requires that we treat them as if they too stand in the shoes of the signatory operators who employed the assigned miners. Based upon their insistence that they stand in the

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NBCWA signatory and a "me too" signatory is not a difference for purposes of our Coal Act analysis. *Id.*

shoes of the Pre-1974 Signatories who actually employed the assigned miners, the Companies claim that premium liability assignments are unconstitutional as applied under Eastern Enterprises because the Pre-1974 Signatories neither committed to paying lifetime benefits, nor contributed to any such expectation on the part of the assigned miners.

However, this argument is based upon a misreading of Unity. Unity was not treated as if it stood in the shoes of a signatory operator who signed a post-1974 NBCWA. Unity was treated as a "related person" to pre-1974 signatories and at least one post-1974 signatory and it was assigned liability for miners who had worked for pre-1974 signatories because of that "related person" status. The Companies are in exactly the same position here.

The Companies also argue that because the assignments were made pursuant to 9706(a)(3), the fact that they have related persons who signed 1974 and later NBCWAs is irrelevant because only the bargaining history of the Pre-1974 Signatories can be considered in determining the constitutionality of the assignments. This argument also allows them to again claim to stand in the shoes of Eastern Enterprises. It is based upon a document in the record signed by a man named "Ray Worley." Worley writes:

> The Coal Act does not permit us to impute a related company's signatory status to that of a signatory operator; that is, a pre-1978 signatory cannot be treated as a 1978 (or later) signatory simply because its parent or "sister" company is a 1978 (or later) signatory.

App. at 178. In the Companies' view, the Commissioner and the Combined Fund Trustees have violated this "policy" because they claim that the Commissioner's and the Combined Fund Trustees' theory that they are liable for the premiums of the miners employed by the Pre-1974 Signatories effectively treats the Pre-1974 Signatories as if they were Post-1974 Signatories. That is, they have imputed the signatory status of the Post-1974 Signatories to the Pre-1974 Signatories. Moreover, the Companies argue this "imputation of signatory status" theory suggests that the assignments originally made were improper. In the Companies' view, all miners who have been assigned under § 9706(a)(3), should have been assigned, or should be reassigned, under either § § 9706(a)(1) or (2) if the pre-1978 operator who employed them had a related person who signed a 1978 or later NBCWA.

We disagree. In the first place, the Companies have never claimed that the original assignments of the miners employed by the Pre-1974 Signatories were incorrect under the § 9706(a) statutory assignment scheme.[10] Second, we

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[10] The Coal Act provides that if an assigned operator believes that beneficiaries have erroneously been assigned to it, the operator can obtain information about the beneficiaries from the Commissioner and seek review of the assignments. 20 U.S.C. § 9706(f); see also 20 C.F.R. § § 422.601-607. The burden is on the assigned operator to make out a prima facie case that the assignments were in error. See 20 C.F.R. § 422.605. If the Commissioner finds that the assignments were in error, he or she can declare them void and reassign the beneficiaries to the appropriate signatory operator or related person. 26 U.S.C. § 9706(f)(3)(A). If the Commissioner finds that the assignments are

reject the Companies' claim that Worley's memo is an admission by the Commissioner that the signatory status of one related person cannot be imputed to another. Reply Br. at 10. The Companies do not identify Worley's position with the Social Security Administration, they do not claim that Worley was speaking for the Commissioner and they do not tell us the purpose of Worley's memo. Third, and perhaps most importantly, Worley's memo appears to speak to the original assignment of beneficiaries procedures under § 9706(a). It does not appear to have anything to do with the related person provisions of the Act.[11] Accordingly, the Companies' "obligations must stand or fall regardless of how [it] was assigned the beneficiaries." *Unity*, 178 F.3d at 655 n.2.

Our rejection of the Companies' attempt to analogize their circumstances to the facts in Eastern Enterprises does not end our inquiry. In Eastern, the plurality also noted that the Court's prior decisions

> have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

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not in error, he or she must notify the assigned operator. The Commissioner's determination is final. 26 U.S.C. § 9706(f)(3)(B).

[11] As we noted at the outset, the Companies are not challenging the constitutionality of the related person provisions.

Eastern, 524 U.S. at 528-529 (O'Connor, J.). In recognition of that possibility, and the possibility that "Eastern embodies principles capable of broader application," we required an additional level of substantive due process analysis to determine if the assignments to the Companies are constitutional as applied in Unity.[12] 178 F.3d at 659. That additional level of analysis measures "the extent of the gap between the coal companies' contractual promises to the Funds and the requirements of the Coal Act." *Id.*

In Unity, we stated that the standard of review when a due process violation is alleged "is forgiving; it bars only arbitrary and irrational congressional action." *Id.* In Unity we began our analysis with an extensive review of the available evidence. We noted that Congress' findings in enacting the Coal Act that the coal industry had created a reasonable expectation that miners would have lifetime benefits, and that the coal companies were responsible for the deterioration of miners' Benefit Plans, were "reasonable evaluations of the problem." 178 F.3d at 670.

We next concluded that the Act's retroactivity did not mean that the legislation was irrational or a violation of due

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[12] While the Eastern Enterprise plurality's cautionary note that legislation might be unconstitutional if it is severely retroactive and substantially disproportionate was made in the course of its Taking Clause analysis, the admonition is applicable to a substantive due process analysis because, as the plurality noted, "our analysis of legislation under the Takings and Due Process Clauses is correlated to some extent." 524 U.S. at 537 (plurality) (citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986)).

process. *Id.* In reaching that conclusion we recognized that "the heart of retroactivity analysis is an evaluation of the extent of the burden imposed by a retroactive law in relation to the burdened parties' prior acts[.]" We held that "where Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." 178 F.3d at 670, 671. In Unity, the period between the coal company's contractual undertaking to pay for benefits to the date of the passing of the Coal Act was eleven years. *Id.* at 670.[13] Although that period was "quite long," we concluded that it was "not so extensive as to violate Justice Kennedy's standard, although Unity offers a close case." *Id.*[14] Even though we concluded that the time frame was not unreasonably long, we were nonetheless aware of the considerable financial burden that can result from an assignment of liability under the Act.[15]

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[13] The Coal Act was passed in 1992 and South Union-WVA, Unity's related person, last signed a NBCWA in 1981.

[14] In Unity, we relied on Justice Kennedy's "explication of the relevant due process principles because the plurality did not reach Eastern's due process claim." 178 F.3d at 670 n.13.

[15] Eastern Enterprises' estimated liability was between $50 and $100 million. 524 U.S. at 529. Unity alleged that its estimated Coal Act liabilities were over six times its total assets and that if the assignments were upheld, it would be bankrupted. 178 F.3d at 655. At the time Unity's appeal was before us, Unity's total payments were under $1 million. *Id.* at 671. Significantly, the Companies do not contend that the assignments will force them into bankruptcy. In fact, they have not bothered to supply us with an estimate of their total potential liability.

Finally, we addressed the proportionality issue and found sufficient proportionality to sustain the constitutionality of the Act.[16] That conclusion was, in large part, driven by the underlying conclusion that the burdens imposed under the Act are justified by the industry's past conduct and the reasonable expectations of lifetime benefits it created. We further concluded that the industry's conduct in creating a benefit fund obligated to pay out more monies than the operators were required to provide, and the industry's conduct in creating the problem of underfunding, was exacerbated by coal companies fleeing the coal industry to avoid further contributions to the fund. *Id.* at 673. Essentially, then, we reasoned that the Act was "Congress' attempt to do equity." *Id.* at 672. Accordingly, we concluded that the Coal Act did not violate substantive due process. Congress was, after all, entitled to remedy the problems caused by the companies' conduct. Given the importance of the coal industry, Congress could certainly respond to a benefits funding structure "vulnerable to 'dumping' retirees when companies left the industry." *Id.* at 673. The Coal Act "is targeted to address the problem of insufficient resources in the benefit funds and . . . it puts the burden on those who, in Congress's reasonable judgment, should bear it." *Id.* at 674.

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[16] A statute will not violate substantive due process where the burden imposed is "proportional to the harm legitimately addressed by the legislature." *Unity*, 178 F.3d at 671. A statute is not unconstitutional "if the liability actually imposed is not out of proportion to the claimant's prior experience with the object of the legislation." *Id.* at 672. "Prior experience can consist of conduct that creates reasonable expectations about the object of the legislation or conduct that creates the problems that impelled the legislature to act." *Id.*

At oral argument, counsel for the Companies stated that the Companies' "related person" Post-1974 Signatories last signed NBCWAs in 1988. That is only four years from the time the Post-1974 Signatories' contractual obligations to the Funds ceased as the effective date of the Act was 1992. That is significantly less time than the eleven years we found acceptable in Unity.[17] Accordingly, we reject the Companies' proportionality attack on the Commissioner's assignments.[18]

B. Can the Commissioner Make Original Assignments After October 1, 1993?[19]

The Companies argue in the alternative that, even if the Commissioner's assignments are constitutional, some of

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[17] We also applied Unity's due process analysis in Anker and found no retroactivity problems in the eight years between the time when Anker's "related person," King Knob, last agreed in a "me too" agreement to be bound by an NBCWA and the passage of the *Coal Act*. *Anker*, 177 F.3d at 173.

[18] After this case was argued, the Supreme Court decided *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 151 L. Ed. 2d 908, 122 S. Ct. 941 (2002). The issue for adjudication in Sigmon was a question of statutory construction centering on whether the Coal Act permits the Commissioner to assign retired miners to successors in interest of out-of-business signatory operators. It has no bearing on the issues presented here.

[19] The district court rejected the Companies' argument that certain assignments should be voided because they were made after October 1, 1993. The standard of review in cases of statutory construction is plenary. *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779, 781 (3d Cir. 1990).

the assignments are nevertheless invalid because they were made on or after October 1, 1993.[20], [21] This argument is grounded upon 26 U.S.C. § 9706(a) which states that the Commissioner "shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business. . . ." (emphasis added). The Companies contend that "shall" means "shall." Accordingly, argue the Companies, since Congress explicitly mandated the Commissioner to make all Coal Act assignments by a date certain, any initial assignments made after that October 1, 1993 are invalid.[22]

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[20] The Companies' complaint acknowledges that the assignments to Stelco Coal and Shenango were made before October 1, 1993. App. at 29, 31. Therefore, this portion of our analysis does not apply to either of those entities.

[21] The Supreme Court has granted certiorari in two cases on this same issue. *Peabody Coal Co. v. Massanari*, ___ F.3d ___, 14 Fed. Appx. 393, 2001 WL 857197 (6th Cir. 2001), cert. granted by *Barnhart v. Peabody Coal Co.*, 151 L. Ed. 2d 883, 122 S. Ct. 918, ___ U.S. ___, (2002)(No. 01-705), and *Bellaire Corp. v. Massanari*, ___ F.3d ___, 14 Fed. Appx. 424, 2001 WL 856962 (6th Cir. 2001), cert. granted by *Holland v. Bellaire Corp.*, 151 L. Ed. 2d 883, ___ U.S. ___, 122 S. Ct. 918 (2002)(No. 01-715).

[22] The Companies "do not challenge the Commissioner's authority to reassign miners after September 30, 1993, i.e., to take miners who were assigned incorrectly before September 30, 1993, and correctly reassign them after September 30, 1993 as provided for in Section 9706(f)(3)." Companies Br. at 23 n.4.

The Companies' position is supported by *Dixie Fuel Co. v. Commissioner of Social Security*, 171 F.3d 1052 (6th Cir. 1999). There, the Court of Appeals for the Sixth Circuit held that the plain language of the statute, the statutory scheme for assigning beneficiaries and the legislative history all demonstrate that "the intent of Congress is clearly expressed in the statute. The October 1, 1993 date is a deadline." *Id.* at 1064.

Nevertheless, we disagree. We are persuaded by the analysis of the Court of Appeals for the Fourth Circuit in *Holland v. Pardee Coal Co.*, 269 F.3d 424 (4th Cir. 2001). That is the only other case that has addressed the effect of the October 1, 1993 deadline, and we believe it is better reasoned than Dixie Fuel. In Pardee Coal, the Commissioner determined that Pardee was a signatory operator and assigned it premium liability for a number of retired miners and their spouses. Because several of the retired miners were assigned to Pardee after October 1, 1993, Pardee denied that it was liable to the Combined Fund for those premiums because they were made after the supposed statutory cut-off date. The district court agreed with Pardee and held that the post-October 1, 1993 assignments were void as a matter of law. However, applying "well-settled principles of statutory construction," the court of appeals examined the text of the Act, the context in which it was enacted, its structure and its legislative history, and found no indication of congressional intent to establish October 1, 1993 as a "jurisdictional deadline, rendering void all beneficiary assignments made by the [Commissioner] after that date." 269 F.3d 437. Our inquiry leads us to the same result.

Admittedly, "shall" is generally mandatory when used in a statute. See, e.g., *United States v. Monsanto*, 491 U.S. 600, 607, 105 L. Ed. 2d 512, 109 S. Ct. 2657 (1989) ("Congress could not have chosen stronger words [than 'shall order forfeiture'] to express its intent that forfeiture is mandatory. . . ."). However, a statutory deadline does not, by itself, establish that Congress intended to strip an agency's authority to act after the deadline has passed. In *Brock v. Pierce County*, 476 U.S. 253, 90 L. Ed. 2d 248, 106 S. Ct. 1834 (1986), the Court had to decide if Congress intended to prevent the Secretary of Labor from recovering misused funds under the Comprehensive Employment and Training Act ("CETA") after the expiration of a statutory deadline in that Act. The relevant provision of CETA stated that the Secretary "shall" issue a final determination regarding misuse of CETA funds within 120 days after receiving a complaint alleging misuse. *Id.* at 254-55. The Secretary disallowed Pierce County's expenditure of approximately $500,000 of CETA funds after an investigation disclosed that the funds had not been used appropriately. The county challenged the Secretary's determination in court alleging that the Secretary had no authority because his determination had been made after the 120 day period had expired.

A unanimous Supreme Court disagreed. The Court held that "the mere use of the word 'shall' . . ., standing alone, is not enough to remove the Secretary's power to act after 120 days." *Id.* at 262. The Court was "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Id.* at 260. Rather, the Court concluded that "the normal indicia of congressional intent" should be used to determine whether an

agency has authority to act despite the expiration of a statutory deadline. Therefore, we can not satisfactorily resolve that question by focusing upon a single word in a statute, even when that word appears to be as conclusive of congressional intent as "shall" appears to be. *Id.* at 262 n.9.

We find the Court's reasoning in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993), dispositive here. There, the Court addressed, inter alia, the issue of whether a civil forfeiture action, filed within the statute of limitations, but without complying with other statutory timing directives, must be dismissed. In finding that the timing did not compel dismissal so long as the action was filed within the statute of limitations, the Court noted that "many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them . . . do not limit their power or render its exercise in disregard of the requisitions ineffectual." *Id.* at 63 (quoting *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511, 20 L. Ed. 702 (1872)). Consequently, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." 510 U.S. at 63 (citations omitted) (emphasis added). No such consequence is included in the Coal Act.

Moreover, we addressed this issue of statutory interpretation in *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106, 113-115 (3d Cir. 1997). We were there concerned with whether the Environmental Protection Agency's failure to act on a Clean Air petition within the statutory time frame deprived the agency of authority to take action on the petition. Relying heavily on Brock v. Pierce

County, we held that a statute stating that an agency "shall" complete action by a certain time does not divest the agency of jurisdiction to act unless there is some additional indication in the statute of a congressional intent to bar further agency action.

Our review of the Coal Act discloses no further indication of congressional intent to deprive the Commissioner of the authority to make original assignments after October 1, 1993. Congress' failure to specify any consequences if the Secretary does not make assignments by the purported drop dead date is quite telling.[23] Moreover, Brock v. Pierce County was decided six years before Congress passed the Coal Act. Accordingly, we must presume that Congress knew that its instruction that the Commissioner "shall" make assignments before October 1, 1993, would not by itself divest the Commissioner of jurisdiction to act after that date. See *United States v. Wells*, 519 U.S. 482, 485, 137 L. Ed. 2d 107, 117 S. Ct. 921 (1997) ("We presume that Congress expects its statutes to be read in conformity with this Court's precedents[.]"). Congress would have specified consequences for failing to assign by a drop dead date or explicitly stated that the Secretary's authority to assign terminated after that date if Congress had intended to abruptly end the Secretary's authority to make original assignments after October 1, 1993.

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[23] See *In re TWA*, 96 F.3d 687, 690 (3d Cir. 1996), referring to a statutory time bar in the Bankruptcy Code as a "drop dead date."

Congress has been this explicit in a number of other statutes. See, e.g., 42 U.S.C. § 1396n(h) (application for waiver of Medicaid requirements must be deemed approved if Secretary of Health and Human Services does not issue a decision within 90 days); 49 U.S.C. § 11701(c) (providing that Surface Transportation Board investigative proceeding is dismissed automatically if not concluded within three years).

The Companies argue that the Act does provide a consequence for not assigning a miner before October 1, 1993 because after that date the miner becomes an "unassigned miner" and is placed in the orphan retiree pool. However, that is not enough to conclude that the Secretary no longer has authority to assign after October 1, 1993. It is simply a safety net insuring that miners who are not assigned will not thereby be denied the benefits they are entitled to. We see no language in the Act, and the Companies direct us to none, that would forge a link between unassigned status and the Commissioner's failure to complete the assignment process by October 1, 1993. In addition, the Act's administrative review provisions suggest that Congress did not intend to limit the Commissioner's authority to make assignments after October 1, 1993. The Coal Act gives coal companies the right to an administrative review of an assignment decision and further provides that if the Commissioner concludes that an initial decision was erroneous, the Commissioner must review the beneficiary's record and reassign the miner accordingly. 26 U.S.C. § 9706(f)(3). Although a coal operator's request for a review must be submitted to the Commissioner within a specified time frame, the Act does not impose any time

limitations on the Commissioner's review process.[24] This strongly suggests that Congress expected that beneficiary reassignments would be made after October 1, 1993. However, if October 1, 1993 is the drop dead date the Companies claim, the Commissioner would have no authority to make a new assignment even though the initial assignment resulted from factual error, a misreading of the statute, or administrative misfeasance. Although it can be argued that the October 1, 1993 cutoff only applies to original assignments, not those made as a result of the administrative review process, nothing in the text of the Act allows us to draw such a distinction.

In addition, we can infer no congressional intent to bar agency action after October 1, 1993, from the purpose and structure of the Coal Act. As we noted earlier, the Coal Act was enacted in 1992 "to ensure that retired coal miners and their dependents would continue to receive the health and death benefits they had been receiving since the 1940s pursuant to a series of collective bargaining agreements." *Anker*, 177 F.3d at 163-64. The Act was bottomed on Congress' explicit finding that

> in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan

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[24] An assigned operator may, within 30 days of receiving notice with respect to a particular beneficiary, request information as to his work history. See 26 U.S.C. § 9706(f)(1). After receiving the information, the assigned operator has an additional 30 days in which to request review of the assignment. See 26 U.S.C. § 9706(f)(2).

> structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

26 U.S.C. § 9701 note (emphasis added). Congress was attempting to "insure that every reasonable effort is made to locate a responsible party to provide the benefits before the costs are passed to other signatory companies which have never had any connection to the individual[.]" 138 Cong. Rec. S17604 (daily ed. Oct. 8, 1992). Thus, the Conference Committee Report declared that the Act's "overriding purpose is to find and designate a specific obligor for as many beneficiaries in the [Benefit] Plans as possible." *Id.* The conferees further stated their "intention that the largest possible number of beneficiaries in the [Benefit] Plans be assigned to a specific or designated company[,]" and "that the number of unassigned beneficiaries is kept to an absolute minimum." *Id.* at S17605.

In short, the Coal Act's key objective is to ensure that the costs of providing retirement benefits will, so far as possible, be borne by the private parties most responsible for creating retired miners' expectations of lifetime health benefits. Consequently, the Act broadly imposes liability on original signatories and a broad class of related business entities. Cutting off the Commissioner's authority to make assignments after October 1, 1993, would surely frustrate that objective. If the Commissioner cannot make assignments beyond that date, otherwise assignable beneficiaries would be retained in the orphan retiree pool and benefits would paid from federal funds. 30 U.S.C. § 1232(h) and 26 U.S.C. §

9705(b). Moreover, if those transfers are inadequate, orphan retiree costs will be imposed on other private parties through the imposition of the unassigned beneficiary premium. See 26 U.S.C. § 9704(d).[25] Those other private parties would have no substantive connection or nexus to the unassigned beneficiary, and would certainly not be responsible for creating any expectation of lifetime benefits.

Thus, reading "shall" to invalidate post-October 1, 1993 assignments would eviscerate a program intended to impose funding burdens on the most responsible parties and shift funding burdens to the government or to other companies with no connection to the beneficiaries assigned to those companies. We are thus reminded of the situation in *Brock v. Pierce County*, where the Court was reluctant to find that a statutory deadline barred agency action because "public rights [were] at stake" and the "public fisc" was implicated. 476 U.S. at 260, 262. Such a result here would also result in a financial windfall to some operators at the expense of those operators whose assignments were completed before October 1, 1993 because the former would be relieved of paying for miners' expectations that they or their related entities helped create.

Finally, putting aside the intricacies of statutory interpretation and legislative history, we reach the same result by employing that all too often overlooked tool: practical common sense. Interpreting the October 1, 1993 date as a

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[25] The government submits that these costs could amount to millions of dollars in additional liability. According to the government, nearly 10,000 beneficiary assignments were made after October 1, 1993. Government's Br. at 48.

cutoff results in a time frame that would make the action Congress required of the Commissioner impossible. It would thereby frustrate the very congressional purpose the Act sought to further. The Coal Act became law in October of 1992. The Commissioner therefore had to review the records of, and assign premium responsibility for, roughly 65,000 miners by October 1, 1993. *Holland v. Pardee Coal Co.*, 269 F.3d at 432 n.9. "To assign those miners, the agency had to search each miner's records, and reconstruct his employment history, and then match that history against the lists of signatory coal operators." *Id.* This Gordian knot was significantly tightened by Congress' failure to appropriate funds until July 2, 1993 -- less than 80 days before the statutory date of October 1, 1993. It would therefore have been as close to impossible as any administrative task can get for the Commissioner to complete the 65,000 by October 1, 1993. Accordingly, we cannot agree that the Commissioner was powerless to make original assignments after October 1, 1993.[26] Thus, as the Court stated in *Regions Hosp. v. Shalala*,

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[26] The House Committee on Ways and Means, in a Committee Print issued on September 3, 1993, only four weeks before the effective date of the Coal Act reinforces this point. The Committee Print reads:

> SSA anticipated that checking the [employment] records would be very-time consuming. Most beneficiaries are associated with the 1950 Benefit Fund, and therefore with miners who retired before 1976. Social Security records are not computerized for work history prior to 1978. Linking an individual's work history to a specific employer will thus require searching through microfilm

522 U.S. 448, 459 n.3, 139 L. Ed. 2d 895, 118 S. Ct. 909 (1998), "The Secretary's failure to meet the deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that the official lacked power to act beyond it."

> records and entering the information by hand into the computer system. Preliminary estimates by the SSA suggest that it would take approximately 150 work years just to retrieve the microfilm records. This does not include the additional work involved in determining the assignment to an employer. On a routine basis, SSA has 140 technicians specially trained to work with the microfilm records, which are difficult to decipher. Extra resources would be needed to complete the assignments by the October 1, 1993 target date.

Financing UMWA Coal Miner "Orphan Retiree" Health Benefits, House Committee of Ways and Means (Sept. 3, 1993), at 64-65 (emphasis added). However, Congress did not appropriate any "extra resources" to the Commissioner between September 3, 1993 and October 1, 1993. Therefore, Congress could not possibly have intended that the Commissioner would complete the entire assignment process by October 1, 1993.

VI.

Accordingly, for all of the above reasons, we will affirm the judgment of the district court.[27]

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[27] Because we have found that the Coal Act is constitutional as applied to the Companies, we need not address the Companies' argument that the Commissioner's refusal to revoke their assignments in the wake of Eastern Enterprises was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 705(2)(A). In addition, because we have found that the Commissioner has the authority to make original assignments after October 1, 1993, we need not address the Companies' argument that they are entitled to a refund of premiums they are paid.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 99-1035

[Filed July 25, 2000]

SHENANGO INC., STELCO USA, INC.; STELCO COAL COMPANY; and MUELLER INDUSTRIES, INC., Plaintiffs

v.

KENNETH S. APFEL, Commissioner of Social Security; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VANHORN; and GAIL R. WILENSKY, Trustees of the United Mine Workers of America Combined Benefit Fund Defendants

JUDGES:
Robert J. Cindrich, United States District Judge.

MEMORANDUM ORDER

In this action plaintiffs challenge the Commissioner of Social Security's decision to require them to pay the health insurance premiums of retired coal miners and their dependents. The assignment of this responsibility was done pursuant to the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § § 9701-9722 ("Coal Act"). Also named as defendants are the trustees of the United Mine Workers of America Combined Fund, which would receive the payments at issue. The Commissioner has moved to dismiss or for summary judgment. The motion has been fully briefed by all parties, including the trustees, who have filed briefs in support of the Commissioner.

The Coal Act is a statute aimed at resolving a formidable problem that arose as a result of the web of labor agreements between mine workers and management ("coal wage agreements"), prompted by the societal changes surrounding the coal industry: namely, who would pay for health benefits promised to miners and their dependents for life, while the industry steadily declined. The Coal Act has been subject to a number of challenges by businesses in plaintiffs' position. Three controlling decisions interpreting the Coal Act provide the answers to the main issues in this case: *Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir. 1999); *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161 (3d Cir. 1999).

The parties have fully debated the content and effect of these opinions in their briefs. Because the decisions are so methodical, comprehensive, and most importantly, authoritative, there is no need to repeat in detail the historical

and legal background of passage of the Coal Act, and its application to other companies in positions similar to plaintiffs'.

Very briefly, in Eastern Enterprises, a Supreme Court plurality decided that the Coal Act was unconstitutional as applied to the plaintiff in that case "by relying on two distinct theories," *Anker*, 177 F.3d at 169 -- four votes finding an improper fifth amendment taking, and one vote for retroactivity that violated due process. The United States Court of Appeals for the Third Circuit in Unity interpreted Eastern Enterprises and determined that it would apply as controlling precedent "only if [the plaintiffs] stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." 178 F.3d at 659. That is plaintiffs' primary claim here: they are in a position "substantially identical" to Eastern Enterprises, obligating us to apply the same conclusion of unconstitutionality to the Commissioner's actions. Plaintiffs also make claims for review of agency decisions under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. In addition, plaintiffs seek to have the Commissioner's assignment of insurance premiums invalidated because they occurred after the statutory deadline.[1]

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[1] More specifically, Count 1 is brought pursuant to the APA for the Commissioner's refusal, after plaintiffs' request, to apply the reasoning of Eastern Enterprises to their assignments. Counts 2 and 3 are for declaratory judgments that the Coal Act violates the due process and takings clauses of the fifth amendment. Count 4 is another APA claim for the Commissioner's assignment of miners beyond the statutory deadline. Count 5 seeks a

The Commissioner argues in his motion to dismiss that plaintiffs are not in a position "substantially identical" to Eastern Enterprises, and so cannot escape his finding of liability on a constitutional theory. For the same reasons, the Commissioner contends that his decision therefore was not arbitrary, capricious, or contrary to law in violation of the APA. Finally, the Commissioner maintains that his assignment of health insurance premiums after the statutory deadline does not strip him of all power under the statute, and would not invalidate his decision.

The Coal Act directs the Commissioner to assign coal industry retirees to "signatory operators" "or any related person" according to a three step method. 26 U.S.C. § 9706(a). The first two steps apply to signatories of the 1978 coal wage agreement, and are not relevant here. The third step catches retirees who are not covered by the first two steps and who meet the statutory criteria:

> Third, if the retiree is not assigned under paragraph (1) or (2), [he will be assigned] to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

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declaratory judgment that the Commissioner must repay any related insurance premiums, dependent on finding of wrongful conduct on previous counts -- if receipt of the premiums were a fifth amendment taking, for example.

26 U.S.C. § 9706(a)(3). The Commissioner assigned miners to plaintiffs under this provision.

As the cases describe, the departure of employers from the coal industry imperiled the funds which pay for the miners' benefits. It also was one of the factors that led to passage of the Coal Act, and to the breadth of the Coal Act's net of liability. "Assigned operators," like plaintiffs, are those "signatory operators" which the Commissioner has found liable for payment of benefits under the Coal Act. See 26 U.S.C. § 9701(c)(5). "Signatory operators" are those employers which signed coal wage agreements in which miners and dependents were promised lifetime benefits. See *id.* § 9701(c)(1).

In allocating responsibility for health insurance premiums, the Coal Act reaches beyond signatory operators, and extends to "related persons" of signatory operators.

> (A) In general. -- A person shall be considered to be a related person to a signatory operator if that person is --
>
> (i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture

> with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).
>
> (B) Time for determination. -- The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

Id. § 9701(c)(2). "Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator." *Id.* § 9704(a). In short, the Coal Act imposes joint and several liability on all related persons. In this way, employment by any one of the related persons is attributed to each of the others.

The essence of this case is determining the legal effect of the relationships among the assigned miners, their employers, and the plaintiffs. In other words, how distant can a "related person" be in legal form, time, or some other variable, before liability for Coal Act premiums is unconstitutional or otherwise invalid?

This question is decisive because of how plaintiffs found themselves covered by the Coal Act. They have been assigned liability for the premiums of about 70 miners. Plaintiffs did not employ the miners. Moreover, the businesses that did employ these miners did not sign the 1974 and later coal wage agreements.[2] Plaintiffs admit they are "related persons" to entities that did sign the 1974 and later coal wage agreements, but these entities likewise did not employ the miners in question.[3] Compl. PP 19-23. Nonetheless, a chain of ownership eventually connects the three relevant links: the direct employers of the miners assigned; the promisers of lifetime benefits; and plaintiffs.

As stated above, plaintiffs' case is premised on the notion that they are in a position substantially identical to Eastern's. Eastern Enterprises tells us that the Coal Act is unconstitutional when applied to a company that did not sign the 1974 or later coal wage agreements that promised lifetime benefits, left the coal business in 1965, and was assessed $50 million to $100 million in Coal Act premiums due for over 1,000 miners that Eastern directly employed. Eastern had a subsidiary company that remained in the coal business and did sign the 1974 and later coal wage agreements, but the subsidiary was sold in 1987.

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[2] The Coal Act combined features of the coal wage agreements that preceded it. The 1974 coal wage agreement is significant because it included for the first time a promise of health benefits for life.

[3] Here a picture of the corporate relationships -- a flow chart, perhaps -- would have been worth a good number of words in the file.

Plaintiffs argue the fact of sale is not significant, however, because Eastern had a subsidiary that signed 1974 and later coal wage agreements, like they did, but ultimately was not liable under the Act. Plaintiffs also allege that the existence of a "related person" in the corporate family is not relevant because the Commissioner did not take this into account when he originally assigned the miners; his conduct reinforces the idea that the miners were assigned based on their employment by companies that left the coal business before 1974, as in Eastern Enterprises. Since the Supreme Court focused on the promises made by operators which employed the miners, and not what corporate affiliates did, the argument continues, the affiliates' status was not material.

We disagree and find the facts regarding ownership in this case to be conclusive. Eastern Enterprises did not directly address the constitutionality of the liability of "related persons" under the Coal Act. Of course, that is the basis on which the Commissioner now asserts liability. A relevant link between the assigned operator and the signatory operator was not in place in Eastern Enterprises, as Eastern ended its relationship with the signatory affiliate in 1987.

In our case, however, this link was in place on July 20, 1992, the date Congress set for determining the relationship between signatory operators and related persons. 26 U.S.C. § 9701(c)(2)(A). This is the difference that leads us not to apply Eastern Enterprises here. The fact that the Commissioner assigned these miners to plaintiffs based on employment by businesses that left the coal industry before 1974 (that is, under section 9706(a)(3)) is not conclusive, in that after the Eastern Enterprises decision, the Commissioner would be entitled -- and no doubt would consider himself

obligated -- to comply with the mandates of the Coal Act in any way that was not inconsistent with the Supreme Court's ruling.

Thus finding that plaintiffs are not in a position substantially to Eastern Enterprises, we would apply Unity here. It is true that all the contours of the liability of related persons were not explored in Unity, as the court of appeals found that the plaintiffs in Unity did not mount a legal challenge to the "related persons" provision of the *Coal Act*. 178 F.3d at 655 n. 2. Nonetheless, the plaintiff in Unity did not sign a 1974 or later coal wage agreement. In addition, the retirees assigned to Unity included miners who had worked for companies that had signed 1974 and later coal wage agreements, and companies that did not. *Id.* at 654-55. The court of appeals upheld both types of assignments. Acknowledging that the issues raised in Unity do not precisely match the issues plaintiffs raise here, Unity nonetheless is a much closer match on the facts than Eastern Enterprises. No other authority plaintiffs cite, particularly unpublished district court opinions, lead us to a contrary result. For these reasons, we apply Unity to this case in finding that the Commissioner's decision to assign the retirees in question to plaintiffs is not constitutionally infirm.

Given this conclusion on their constitutional claims, plaintiffs' APA claims must fail. Our authority under the APA is limited to the familiar arbitrary, capricious, or contrary to law standard. See 5 U.S.C. § 706(2)(A). We may not substitute our judgment for that of the agency, and we owe the agency's determination considerable deference. *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 84 L. Ed. 2d 90, 105 S. Ct. 1102 (1985);

Seidman v. Office of Thrift Supervision, Dep't of the Treasury (*In re Seidman*), 37 F.3d 911, 924 (3d Cir. 1994). If the agency's view is rational, it must be upheld. *Id.* Again, for the reasons stated at length in Unity and Anker regarding the grounds for assigning liability under the Coal Act, we find that the Commissioner's decision to apply the Coal Act to plaintiffs in the manner challenged was not arbitrary, capricious, or contrary to law.

As for whether the Commissioner's assignments should be voided because they were made after the statutory deadline of October 30, 1993, 26 U.S.C. § 9706(a), we likewise find against plaintiffs. The authority on which they rely, *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052 (6th Cir. 1999), makes a plausible case for the literal interpretation of October 1, 1993 date as the unassailable deadline for all assignments. We are instead persuaded by the line of cases the Commissioner cites, recognizing the doctrine that the expiration of a mandatory deadline set by Congress does not strip agencies of all power to act afterward. *Regions Hosp. v. Shalala*, 522 U.S. 448, 459, 139 L. Ed. 2d 895, 118 S. Ct. 909 n. 3 (1998) ("the Secretary's failure to meet the deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that official lacked power to act beyond it"); *United States v. Good Real Property*, 510 U.S. 43, 63, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction"); *United States v. Montalvo-Murillo*, 495 U.S. 711, 718, 109 L. Ed. 2d 720, 110 S. Ct. 2072 (1990) ("although the duty is mandatory, the sanction for breach is not loss of all later powers to act"); *Brock v. Pierce County*,

476 U.S. 253, 260, 90 L. Ed. 2d 248, 106 S. Ct. 1834 (1986) (failure of agency to begin investigation within statutory period did not negate later power to investigate). Given that the court of appeals has recently followed this doctrine, we believe we are compelled to apply it here. See *SW Penna Growth Alliance v. Browner*, 121 F.3d 106, 114 (3d Cir. 1997).

In accordance with the foregoing, we find that under the facts plaintiffs have pleaded, they have not stated a claim on which relief can be granted. The Commissioner's Motion to Dismiss the Complaint, Doc. No. 4, therefore is GRANTED.

There remains a counterclaim for declaratory and injunctive relief brought by the trustee defendants. The court believes its ruling goes a considerable way in resolving the remedy sought in the counterclaim -- a declaration of the constitutionality of the Coal Act as applied to persons in plaintiffs' position, and an injunction against plaintiffs withholding payments due under the Coal Act. The court also believes that, given counsel's familiarity with the law, the state of the law itself, and the narrow requests for relief, the counterclaim is of the type which counsel frequently resolve without further court involvement, if for no other reason than promptly to permit the case to make its way to the next appropriate forum, should plaintiffs be so inclined.

If the court's beliefs are wrong, we of course are prepared to supervise pretrial preparation and ultimate resolution. To help determine the best way to proceed, the remaining parties should confer about these questions and file a statement of position in 10 days, jointly if possible, on

whether they contemplate further proceedings in this court, and if so, in what form. The court will act accordingly after receiving this information.

SO ORDERED this 25 day of July, 2000.

Robert J. Cindrich

United States District Judge

Supreme Court, U.S.
FILED
MAY 27 '03
OFFICE OF THE CLERK

No. 02-1419

In the Supreme Court of the United States

SHENANGO INCORPORATED, ET AL., PETITIONERS

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Commissioner of Social Security was constitutionally required under *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), to void assignments to petitioners of liability for retired miners' benefits under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, even though petitioners' "related persons" under the Act employed the miners and promised to provide lifetime health benefits to all miners.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-49a) is reported at 307 F.3d 174. The opinion of the district court (Pet. App. 50a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 2002. A petition for rehearing was denied on December 23, 2002 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, in response to a financial crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of health-care benefits. Those benefits had been promised to retired coal miners in a series of collective bargaining agreements, known as National Bituminous Coal Wage Agreements (NBCWAs), that were negotiated between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators' Association (BCOA), a multi-employer bargaining association. See *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 504-514 (1998) (plurality opinion).

In the 1930s, as the UMWA organized workers in the coal industry, heath-care benefits became an important issue in collective bargaining. In 1947, the UMWA and several coal operators entered into a NBCWA in which the operators agreed to provide health-care benefits to miners and their dependents. The 1947 NBCWA did not, however, promise specific benefits or guarantee lifetime benefits. The UMWA and the BCOA entered into similar agreements in subsequent years. See *Eastern Enterprises*, 524 U.S. at 504-509 (plurality opinion).

In 1974, the UMWA and the BCOA entered into a NBCWA that, for the first time, explicitly promised lifetime health benefits to miners and their dependents. In 1978, the UMWA and the BCOA entered into a new NBCWA in which signatory operators agreed to provide lifetime benefits for their own active and retired employees as well as for "orphaned" miners whose employers had ceased coal operations or withdrawn from the NBCWAs. Signatory employers were required to contribute enough to pay for the promised benefits and

to remain liable as long as they remained in the coal industry. See *Eastern Enterprises*, 524 U.S. at 509-511 (plurality opinion).

In the 1980s and early 1990s, the financial stability of the private multi-employer plans that had been established to finance those benefits was undermined by increasing health-care costs and by the termination of many coal operators' contribution obligations as those operators switched to non-union employees or left the coal industry altogether. As more coal operators withdrew from the plans, the remaining operators were forced to bear more of the costs, which in turn led to even more defections and created a downward spiral. See *Eastern Enterprises*, 524 U.S. at 511-514 (plurality opinion).

Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to * * * retirees," to "allow for sufficient operating assets for such plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. No. 102-486, Title XIX, § 19142, 106 Stat. 3037. In furtherance of those ends, the Coal Act established a private multi-employer plan known as the United Mine Workers of America Combined Benefit Fund (Combined Fund). The Combined Fund provides health-care benefits to individuals who, at the time that the Coal Act was enacted, were receiving benefits from the multi-employer plans. See 26 U.S.C. 9702, 9703(f).

The Combined Fund is financed principally by premiums paid by the "signatory operator[s]" that formerly employed the retired miners who (with their

dependents) are beneficiaries of the Combined Fund and by the "related persons" of signatory operators. 26 U.S.C. 9704, 9706(a). The Coal Act defines a "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1).

b. The Coal Act vests the Commissioner of Social Security (Commissioner) with the task of assigning retired miners who are eligible for benefits from the Combined Fund to signatory operators or related persons of those operators. 26 U.S.C. 9706(a). The Coal Act provides for assignments to be made under a three-tiered hierarchy based on how long and how recently a miner worked for a particular employer and on whether the employer signed a coal wage agreement in 1978 or thereafter. See 26 U.S.C. 9701(c)(1), 9706(a). Any signatory operator that receives business revenue, "whether or not in the coal industry," may be assigned beneficiaries under the Coal Act. 26 U.S.C. 9701(c)(7), 9706(a).

The Coal Act also imposes shared responsibility on a signatory operator's "related persons," which are defined to include members of a commonly controlled group of corporations that includes the signatory operator, businesses under common control with the signatory operator, and successors in interest to a related person. 26 U.S.C. 9701(c)(2)(A). Related persons may be directly assigned liability for premiums for a retired miner and his dependents. See 26 U.S.C. 9706(a). In addition, related persons are jointly and severally liable for the premiums of the assigned operator. See 26 U.S.C. 9704(a). For assignment purposes, "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related person to such operator." 26 U.S.C. 9706(b)(1)(A).

If a retired miner cannot be assigned to any coal operator or related person that remains in business, the miner is considered "unassigned." See 26 U.S.C. 9704(a)(3) and (d). The Coal Act provides several sources of funding for the benefits of unassigned beneficiaries, including transfers from the Department of the Interior's Abandoned Mine Land Reclamation Fund (AML Fund) and, if necessary, assessments of an "unassigned beneficiary premium" from coal operators and related persons that have been assigned retired miners. See 26 U.S.C. 9704(a), 9705(a) and (b).[1]

c. In *Eastern Enterprises*, this Court invalidated the Commissioner's assignment to Eastern of responsibility for the Combined Fund premiums of more than 1000 retired miners and their beneficiaries that were estimated to total between $50 million and $100 million. The Commissioner had made those assignments under 26 U.S.C. 9706(a)(3), the third tier of the Coal Act's assignment hierarchy, because Eastern had employed the miners and had signed NBCWAs in the 1960s.[2]

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[1] The AML Fund was established by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, for the purpose of reclaiming and restoring land and water resources adversely affected by past coal mining. See 30 U.S.C. 1231(c). The AML Fund is financed by fees assessed on coal operators for each ton of coal produced. See 30 U.S.C. 1232(a). To date, AML Fund transfers have been sufficient to avoid the assessment of an unassigned beneficiary premium.

[2] Although Eastern had a subsidiary, Eastern Associated Coal Corporation (EACC), that had signed NBCWAs in 1974 and thereafter, Eastern had sold all of its interest in EACC in 1987. 524 U.S. at 516 (plurality opinion); see 26 U.S.C. 9701(c)(2)(B) (related person status is determined as of July 20, 1992, unless coal operator went out of business earlier). Because EACC was not a "related person" to Eastern within the meaning of the Coal Act, the

A plurality of the Court concluded that the challenged assignments violated the Just Compensation Clause of the Fifth Amendment. The plurality reasoned that the Coal Act "place[d] a severe, disproportionate, and extremely retroactive burden on Eastern." 524 U.S. at 538. The plurality emphasized that Eastern had not engaged in coal mining since 1965, had employed the assigned miners "some 30 to 50 years before" the enactment of the Coal Act, and had not signed "the 1974, 1978, or subsequent NBCWA's," which the plurality described as the "agreements that first suggest an industry commitment to the funding of lifetime health benefits." *Id.* at 530-531. The plurality noted that, under the earlier NBCWAs that Eastern had signed, a coal operator's obligation was limited to a fixed royalty, withdrawal was permitted, and miners were provided with "far less extensive" benefits that "were fully subject to alteration or termination." *Id.* at 531; see *id.* at 535-536.

Justice Kennedy concurred in the judgment. 524 U.S. at 539-550. Justice Kennedy disagreed with the plurality's takings analysis, but concluded that the challenged assignments violated the Due Process Clause. Justice Kennedy reasoned that the Commissioner's assignments to Eastern based on "events which occurred 35 years ago" had "a retroactive effect of unprecedented scope" that could not be justified as "remedial," because those assignments were designed to satisfy a promise to provide lifetime health benefits "made long after Eastern left the coal business." *Id.* at 549-550.

Commissioner had not made assignments to Eastern based on its relationship to EACC. See 524 U.S. at 530 (plurality opinion).

2. Petitioners are four coal companies that were assigned responsibility for paying Coal Act premiums with respect to approximately 70 miners and qualifying dependents. The Commissioner initially made those assignments pursuant to 26 U.S.C. 9706(a)(3) on the ground that petitioners were "related" to a defunct employer that had signed a pre-1978 NBCWA. See Pet. App. 14a.

After this Court's decision in *Eastern Enterprises*, the Commissioner undertook a comprehensive review of all assignments that were made under 26 U.S.C. 9706(a)(3), including those made to petitioners. The Commissioner concluded that, if neither the original employer of a miner nor a statutory "related person" signed the 1974 NBCWA or a subsequent NBCWA, the assignment could not be distinguished from *Eastern Enterprises* and thus had to be voided. See Pet. App. 20a.

At the same time, however, the Commissioner concluded that an assignment was distinguishable from those in *Eastern Enterprises*, and could be sustained, if the assigned company was a member of "a controlled group of corporations," 26 U.S.C. 9701(c)(2)(A)(1), that contained a signatory to the 1974 NBCWA or a subsequent NBCWA. The Commissioner recognized that no such circumstances were presented in *Eastern Enterprises*. Accordingly, because each petitioner was a member of a controlled group of corporations that contained a signatory to the 1974 NBCWA and subsequent NBCWAs, the Commissioner declined to vacate petitioners' assignments. See Pet. App. 20a-21a.

3. Petitioners filed suit against the Commissioner and the Trustees of the Combined Fund. As relevant here, petitioners contended that the Commissioner's refusal to vacate their assignments violated the Consti-

tution and was arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

The district court sustained the Commissioner's decision. Pet. App. 50a-61a. The court noted that petitioners' challenge was "premised on the notion that they are in a position substantially identical to Eastern's." *Id.* at 56a. The court rejected that premise on the ground that each petitioner, unlike Eastern, has a "related person," with the meaning of the Coal Act, that signed the 1974 NBCWA and later NBCWAs. *Id.* at 56a-58a. The court explained that here, in contrast to *Eastern Enterprises*, "a chain of ownership eventually connects the three relevant links: the direct employers of the miners assigned; the promisers of lifetime benefits; and the plaintiffs." *Id.* at 56a. The court then concluded that "the Commissioner's decision to assign the retirees in question to [petitioners] is not constitutionally infirm," *id.* at 58a, and "was not arbitrary, capricious, or contrary to law" under the APA, *id.* at 59a.

4. The court of appeals affirmed. Pet. App. 1a-49a.

The court of appeals, like the district court, noted that petitioners' challenge to their assignments "turns on whether they are in a substantially identical position to Eastern Enterprises with regard to the assignments." Pet. App. 25a (internal quotation marks omitted). The court explained that the "fragmented decision in *Eastern Enterprises*," in which no single rationale commanded the support of five Justices, "mandates judgment for [petitioners] only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." *Id.* at 23a-24a (quoting *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 659 (3d Cir.), cert. denied, 528 U.S. 963 (1999)).

The court of appeals concluded that "the circumstances here are not substantially equivalent to the circumstances in *Eastern Enterprises*." Pet. App. 25a. The court observed that *Eastern Enterprises* "did not involve liability under the Coal Act's 'related person' provisions," and that "Eastern was assigned premium liability under the Coal Act solely because it employed the assigned miners." *Ibid.* "In contrast," the court noted, petitioners' "liability here arises from their relationship to 'related person' subsidiaries that signed a NBCWA in 1974 or thereafter." *Id.* at 25a-26a.

The court of appeals rejected petitioners' contention that, because Eastern had a subsidiary that signed the 1974 NBCWA and later NBCWAs, they were in a "substantially equivalent" position to Eastern. Pet. App. 27a. The court explained that, unlike petitioners, Eastern divested itself of that subsidiary before the Coal Act was enacted. Thus, the court stated, Eastern's subsidiary could not be deemed a "related person" for purposes of the Coal Act, and "premium liability could not have been imposed on Eastern as a related person to [the subsidiary]." *Ibid.*

In addition, the court of appeals held that the Coal Act's imposition of retroactive premium liability on petitioners was not otherwise irrational or a denial of due process. Pet. App. 34a-37a. The court noted that, "where Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." *Id.* at 35a (quoting *Unity*, 178 F.3d at 670, 671). The court concluded that the burdens imposed by the Coal Act are reasonably proportional to, and justified by, the coal industry's role in creating reasonable expectations of lifetime benefits and contributing to the deterioration of the preexisting private benefit plans. *Id.* at 34a, 36a. The court also

suggested that the imposition of liability on petitioners was not severely retroactive, given that petitioners' "related persons" signed NBCWAs as recently as 1988, only four years before the Coal Act's enactment. *Id.* at 37a.

ARGUMENT

The petition concededly raises "substantially the same" issues and arguments that were raised in two other recent petitions (Pet. 15), both of which have been denied. *A.T. Massey Coal Co.* v. *Massanari*, 123 S. Ct. 1928 (2003) (No. 02-956); *Berwind Corp.* v. *Barnhart*, 123 S. Ct. 1927 (2003) (No. 02-995). The same reasons that militated against review in *Massey* and *Berwind* also militate against review here.

The court of appeals correctly concluded that this Court's decision in *Eastern Enterprises* does not require invalidation of the assignments at issue here. Petitioners are not in a substantially identical position to the coal operator in *Eastern Enterprises* because, unlike that coal operator, petitioners have statutory "related persons" that employed the coal miners for whom petitioners were assigned responsibility and signed NBCWAs promising lifetime benefits to *all* coal miners. Congress could constitutionally impose Coal Act liability on companies such as petitioners, which can be presumed to have profited from the promises made by members of their corporate group. The court of appeals' decision in this case is consistent with the decisions of other courts of appeals and raises no question of continuing significance.

1. The court of appeals correctly held that petitioners are not similarly situated to the former coal operator in *Eastern Enterprises* so as to require invali-

dation of their assignments under the holding of that case.

a. In concluding that the assignments in *Eastern Enterprises* were unconstitutional, the plurality and concurring opinions emphasized that Eastern had not signed the 1974 NBCWA, which was the first to make an explicit promise of lifetime health-care benefits, or any subsequent NBCWA reiterating that promise, and thus could not reasonably have contemplated being held responsible for providing such benefits. See 524 U.S. at 530 (plurality opinion) (explaining that Eastern had not "participated in negotiations nor agreed to make contributions" to satisfy the "industry commitment to the funding of lifetime health benefits" made in the 1974 NBCWA and later NBCWAs); *id.* at 550 (Kennedy, J., concurring in the judgment) (reasoning that Eastern was "not responsible for [retired miners'] expectation of lifetime health benefits" because it did not sign NBCWAs in 1974 or thereafter).

In contrast, petitioners could reasonably have anticipated the obligations at issue here. As of the dates that the Coal Act was enacted and "related person" status is determined, see 26 U.S.C. 9701(c)(2)(B), petitioners had "related persons" that had signed the 1974 NBCWA and subsequent NBCWAs promising lifetime benefits not only to their own retirees, but also to other retirees who were "orphaned" by their employers. Petitioners could not, therefore, have had a "reasonable investment-backed expectation," *Eastern Enterprises*, 524 U.S. at 532 (plurality opinion), that they could never be made responsible for providing the very benefits to their own retirees (or those of an affiliate) that their affiliates promised to *all* retired miners.

b. Petitioners contend (Pet. 15-16) that they cannot meaningfully be distinguished from Eastern because

Eastern had a subsidiary, Eastern Associated Coal Corporation (EACC), that signed the 1974 NBCWA and subsequent NBCWAs. See note 2, *supra*. As the plurality explicitly noted in *Eastern Enterprises*, however, Eastern sold EACC in 1987, five years before the enactment of the Coal Act and the date as of which the Coal Act determines "related person" status. In those circumstances, the plurality recognized that "Eastern's liability under the Act [could] bear[] no relationship to its ownership of EACC." 524 U.S. at 516, 530 (plurality opinion). Accordingly, the Court had no occasion in *Eastern Enterprises* to consider whether the Constitution would bar the assignment of premium liability to a company that, at the time for determining "related person" status, was member of a controlled group of corporations that both employed the miner and signed the 1974 NBCWA or a subsequent NBCWA.

c. Nothing in *Eastern Enterprises* or other decisions of this Court suggests that the Constitution is violated by, in effect, treating all members of a commonly controlled group of corporations as a single entity for purposes of imposing premium liability under the Coal Act. Congress could reasonably presume that all member of the corporate group profited from the services rendered by its employees in return for its promises of lifetime health-care benefits. Congress's choice in the Coal Act to permit liability to be imposed not only on NBCWA signatories but also on "related persons" was particularly justified given the evidence before it that coal operators' use of nominally separate companies had contributed substantially to the funding crisis that the Coal Act was intended to solve. Cf. *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729-730 (1984) (recognizing that Congress ordinarily may impose retroactive liability on employers to fund em-

ployee benefits in pursuit of "a rational legislative purpose," such as to spread the cost of those benefits among all those "who have profited from the fruits of [the employees'] labors") (citation omitted); accord, *e.g.*, *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 646 (1993); *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

2. The Third Circuit's decision in this case does not conflict with the decision of any other court of appeals. To the contrary, the Fourth Circuit has held, consistently with the Third Circuit here, that *Eastern Enterprises* does not require the invalidation of assignments to companies that are not themselves signatories of the 1974 NBCWA or a subsequent NBCWA, but that are statutory "related persons" of such signatories. See *A.T. Massey Coal Co.* v. *Massanari*, 305 F.3d 226 (2002), cert. denied, 123 S. Ct. 1928 (2003). More generally, the D.C. Circuit has held that assignments based on participation in the 1974 NBCWA or a subsequent NBCWA are distinguishable from those in *Eastern Enterprises*, without attributing any significance to whether the NBCWA was signed by the party to which the assignment was made or by a related person. See *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1257 (1998). The uniformity of judicial holdings on the scope and application of *Eastern Enterprises* demonstrates that no further review by this Court is necessary or appropriate.

3. This Court issued its decision in *Eastern Enterprises* nearly five years ago. The Commissioner has long since decided which assignments should and should not be vacated based on the holding in that case. It is thus unlikely that cases challenging the Commissioner's determinations as to which Coal Act assignments fall

within the ambit of *Eastern Enterprises* will continue to arise in the future. Moreover, as the elderly beneficiary population continues to decline as a result of mortality, petitioners and other assigned companies will have to pay premiums for fewer beneficiaries with each passing year. For these reasons as well, this case presents no question of continuing importance that warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2003

Supreme Court, U.S.
FILED
MAY 2 7 2003
OFFICE OF THE CLERK

No. 02-1419

IN THE

Supreme Court of the United States

SHENANGO INCORPORATED, *et al.*,
Petitioners,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION FOR THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

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QUESTION PRESENTED

Under the Coal Industry Retiree Heath Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"), Petitioners Shenango Incorporated, Stelco U.S.A., Inc., Stelco Coal Company, and Mueller Industries, Inc. (the "Companies") are members of controlled groups of corporations that include one or more companies that signed the 1974, 1978, or later National Bituminous Coal Wage Agreements ("NBCWAs") with the United Mine Workers of America ("UMWA"). Each of these collective bargaining agreements referred expressly to lifetime health care benefits for coal industry retirees and their dependents. Under the Coal Act, the Commissioner of Social Security has assigned the Companies liability for the health care premiums of retirees who worked for employers that were either owned by the Companies or absorbed through a corporate merger but that are no longer in business.

The question presented is whether Congress correctly concluded in the Coal Act that neither the Due Process Clause nor the Takings Clause of the Fifth Amendment prevents the Commissioner from treating the Companies and their "related persons" as a single controlled group of corporations for purposes of assessing liability for retiree health care under the statute.

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SHENANGO INCORPORATED, *et al.*,
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On Petition for a Writ of Certiorari to the
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for the Third Circuit

BRIEF IN OPPOSITION FOR THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-49a) is reported at 307 F.3d 174. The opinion of the district court (Pet. App. 50a-61a) is reported at 2000 U.S. Dist. LEXIS 22208 (W.D. Pa. July 25, 2000).

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"), as applied to petitioners Shenango Incorporated, Stelco U.S.A., Inc., Stelco Coal Company, and Mueller Industries, Inc. (the "Companies"). The Companies do not reproduce the statute in full in their submission. Among other things, they omit the prefatory provisions of the Coal Act that set forth Congress' findings and declaration of policy.

Accordingly, the complete Coal Act is reproduced as an appendix to this brief.

STATEMENT OF THE CASE

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a divided Court held one provision of the Coal Act unconstitutional as applied to the petitioner in that case. The plurality and concurring opinions in *Eastern* held that Section 9706(a)(3) of the statute, 26 U.S.C. § 9706 (a)(3), is unconstitutional as applied to a company that left the coal business in 1965, did not sign any collective bargaining agreement with the UMWA after that time, and was not a statutory "related person" to any company that signed a National Bituminous Coal Wage Agreement ("NBCWA") in 1974 or thereafter. The Companies in this case claim that they are "substantially identical" to the petitioner in *Eastern*. Pet. 6. As the court of appeals correctly recognized, however, the Companies and Eastern are not similarly situated, and their reliance on *Eastern* is misplaced.

The Companies themselves acknowledge (Pet. 15) that their arguments are "substantially the same" as those presented in two petitions that this Court denied earlier this month, *A.T. Massey Coal Company, Inc. v. Barnhart*, 305 F.3d 226 (4th Cir. 2002), *cert. denied*, 123 S.Ct. 1928 (2003), and *Berwind Corp. v. Commissioner of Social Security*, 307 F.3d 222 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 1927 (2003). Indeed, the Companies' say that they "incorporate[] by reference" the arguments made in the petitions filed by Massey and Berwind. Although the Companies contend that they also offer a "supplemental argument" in support of their request review, the petition does not contain any substantive point not already raised in the petitions filed by Massey and Berwind.

Congress decided in the Coal Act to treat a controlled group of corporations – a signatory operator and all of its related persons – as a single entity for purposes of assessing

health care liability. *See, e.g.*, 26 U.S.C. §§ 9701(c)(2)(A)(i); 9706(b)(1)(A). Congress rationally determined that all entities in a corporate family should be responsible for the health care commitments that any of those entities made. As a signatory to the 1974, 1978, or later NBCWAs, coal operators in each Company's controlled group made commitments regarding lifetime health care not only to their own former employees, but also to *all* of the beneficiaries of the collectively bargained UMWA multiemployer health care plans then in existence, including the beneficiaries whose premium assignments gave rise to these proceedings. That is the nature of a multiemployer plan. Particularly in these circumstances, there is nothing surprising or irrational about the legislative decision in the Coal Act to require the Companies and their corporate families to participate in the statutory solution to the financial crisis that afflicted the UMWA plans.

In contrast to the petitioner in *Eastern*, each of the Companies, like the petitioners in *Massey* and *Berwind*, is part of a controlled group of corporations that includes one or more coal companies that signed the 1974, 1978, or later NBCWAs. Under the "related person" provisions of the Coal Act, the Social Security Administration ("SSA") assigned each of the Companies several beneficiaries.

Contrary to the Companies' submission, this case does not involve employers that are "substantially identical" to Eastern. Rather, the issue here is whether the congressional decision to treat all members of a corporate control group as a single entity for purposes of Coal Act liability violates the Takings Clause or the Due Process Clause of the Fifth Amendment. The case was argued in the court of appeals on the same day before the same panel as *Berwind*. The court properly concluded, as it did in *Berwind* and as the Fourth Circuit did in *Massey*, that the Coal Act's "related person" provisions do not raise any constitutional concern. Further review is not warranted.

I. The Coal Act

The history of the events leading to enactment of the Coal Act has been reviewed at length by this Court and others. *Barnhart v. Peabody Coal Co.*, 123 S. Ct. 748 (2003); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002); *Eastern Enterprises*, 524 U.S. at 504-15 (plurality opinion); *Holland v. Pardee Coal Co.*, 269 F.3d 424, 427-29 (4th Cir. 2001), *cert. denied*, 123 S. Ct. 986 (Jan. 21, 2003); *Unity Real Estate Co. v. Holland*, 178 F.3d 649 (3d Cir. 1999), *cert. denied*, 528 U.S. 963 (1999); *Blue Diamond Coal Co. v. Shalala* (*In re Blue Diamond Coal Co.*), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996). In addition, the relevant historical and legislative background has been summarized in the briefs in opposition recently filed by the Trustees of the UMWA Combined Benefit Fund in *Massey* and *Berwind*. We therefore mention only those aspects of that background that are relevant here.

A. History and Structure of the Coal Act

In October 1992, Congress enacted the Coal Act, to ensure the continuation of health benefits for retired coal miners and their families, including those that had been employed by the Companies' "related persons." The Coal Act was designed to remedy a financial crisis that threatened the solvency of the then-existing collectively bargained multiemployer system of health care, which had been providing health benefits to more than 100,000 beneficiaries. During the years immediately before the Coal Act was passed, the collectively bargained multiemployer health care plans – the UMWA 1950 Benefit Plan and the UMWA 1974 Benefit Plan – had been providing health care to the retirees of the Companies' "related persons", even though these entities had ceased to make contributions to those plans. In this regard, the Companies' "related persons" are typical of many other employers that for one reason or

another had discontinued their participation in the multiemployer system, but left behind their retirees to receive health care financed by others.

In the Coal Act, Congress provided for the creation of two new statutory trust funds. One of these funds is the UMWA Combined Benefit Fund ("Combined Fund"), into which the two existing multiemployer health care plans were merged effective February 1, 1993. The Combined Fund is financed primarily through annual premiums assessed to the beneficiaries' former employers.

The Coal Act also prescribes the method for financing health benefits for so-called "orphan" beneficiaries – those beneficiaries who could not be assigned to any signatory operator. These benefits are financed through statutorily mandated annual transfers of funds from two sources that otherwise would have been unavailable for retiree health care. First, under Section 9705(a) of the Coal Act, Congress directed that a total of $210 million be transferred to the Combined Fund from the UMWA 1950 Pension Plan, in equal installments during the Combined Fund's first three plan years. 26 U.S.C. § 9705(a). These funds were to be used principally to pay for unassigned beneficiaries' health care. Second, under Section 9705(b) of the Coal Act, Congress provided that, for each Combined Fund fiscal year beginning on October 1, 1995 and thereafter, certain funds will be transferred to the Combined Fund from the Abandoned Mine Reclamation Fund (the "AML Fund") established under the Surface Mining Control and Reclamation Act of 1977. 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(b), (h). These sums are to be used entirely to pay for unassigned beneficiaries' health care.[1] If the various transfers

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1/ In addition to the transfers prescribed in the Coal Act itself, Congress twice has made special appropriations for the Combined Fund. In each case, the appropriation involved an

provided in the statute prove insufficient to cover the unassigned beneficiaries' premium that otherwise would be assessed under the statute, the assigned operators will be assessed their pro rata share of the unpaid premium for unassigned beneficiaries. 26 U.S.C. §§ 9704(d), 9705(b)(2).

B. Related Person and Controlled Group Liability

In enacting the Coal Act, Congress sought to ensure that coal companies' internal corporate structure and the multiplicity of corporate entities frequently created under a common corporate parent would not be used as a means of evading statutory health care obligations. Congress determined that it was necessary to treat members of corporate families as a single entity for purposes of imposing liability for Coal Act premiums. The statute accomplishes this goal in three ways.

First, the Coal Act permits beneficiary assignments to be made to signatory operators or to their "related persons." 26 U.S.C. § 9706(a). Section 9701 provides that an entity is a related person to a signatory operator if it is: (i) a member of the same "controlled group of corporations" that includes the signatory operator, as that term is defined in 26 U.S.C. § 52(a); (ii) a trade or business under "common control" with a signatory operator, as that term is defined in 26 U.S.C. § 52(b); (iii) any other person who had a partnership interest or joint venture with a signatory operator in a business within the coal industry, if such business employed eligible beneficiaries; or (iv) a successor in interest of any person described in the previous three categories. *Id.* § 9701(c)(2). In turn, Section

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additional transfer from the AML Fund. Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Title V, 113 Stat. 1501, 1501A-214 (1999); Department of Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, § 701(a), 114 Stat. 922, 1024-25 (2000).

52(a) of the Internal Revenue Code defines "controlled group of corporations" to include, *inter alia*, parent-subsidiary groups, where the parent owns more than 50 percent of the total voting power of all classes of stock in the subsidiary or where the parent owns more than 50 percent of the total value of shares of all classes of stock in the subsidiary. *Id.* §§ 52(a), 1563(a).

The determination of which entities are "related persons" for purposes of the Coal Act is made as of July 20, 1992, or, if a signatory operator is no longer in business on that date, as of the time immediately before the operator ceased to be in business. 26 U.S.C. § 9701(c)(2)(B). A "related person" thus need not ever have mined coal or signed any NBCWAs, as long as it satisfies the statutory definition.

Second, the Coal Act makes all related persons jointly and severally liable for the obligations imposed under the Act. For example, with respect to Combined Fund premiums, Section 9704(a) provides: "Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator." 26 U.S.C. § 9704(a); *see also id.* § 9711(c) (individual employer plan obligations); § 9712(4) (1992 Plan obligations).

Finally, the Coal Act aggregates the employment of retirees by each "related person" in a corporate family and treats the related persons as a single employer for purposes of assigning Combined Fund beneficiaries. The statute provides that "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b)(1)(A). Thus, every member of a controlled group is treated as if it had employed each of the miners that any one member had employed. As a consequence, as long as at least one member of the controlled group signed an NBCWA in 1974 or thereafter, all members of the controlled group are treated as if they had also signed that NBCWA, because employment by

any such signatory operator is treated as employment by any related persons to the operator.

II. The Companies' Involvement In The Multiemployer Health Care System

Each of the Companies is a part of a commonly controlled enterprise that participated in a collective multiemployer undertaking expressed in the NBCWAs of 1974, 1978, and later. These collective bargaining agreements referred explicitly to lifetime health benefits. The commitments undertaken by signatory companies were addressed not only to each company's own retirees but to *all* participants in the UMWA multiemployer system (including the retirees and their dependents whose premium assignments gave rise to this litigation).

Petitioner Shenango is a "related person" of Lucerne Coke Company ("Lucerne"), which was merged into Shenango in or shortly after 1971. Pet. 11. Lucerne last signed an NBCWA in 1971 and employed the miners assigned to Shenango. Pet. App. 13a n.4. As of July 20, 1992, Shenango was related, via its parent corporation, to Aloe Coal Company, which signed NBCWAs in 1974 and thereafter. *Id.*

Petitioner Stelco Coal mined coal under the name of its "related person" Mather Collieries ("Mather"), which permanently ceased operating sometime before 1964. Pet. App. 13a n.4. Petitioner Stelco USA is commonly owned with Stelco Coal. *Id.* Mather was a signatory to several NBCWAs, the last of which it signed in 1959. It employed the miners assigned to Stelco Coal and Stelco USA. As of July 20, 1992, Stelco Coal and Stelco USA were "related persons" to Pikeville Coal Company ("Pikeville"), which signed the 1974 and subsequent NBCWAs. *Id.*

Petitioner Mueller Industries, Inc. ("Mueller") is a "related person" to Joanne Coal Company ("Joanne"). Mueller

merged with Sharon Steel Corp., which had previously merged with Joanne. Joanne mined coal until approximately 1969. Pet. App. 13a n.4. Joanne was a signatory to a series of NBCWAs, the last of which it signed in 1964. It employed the miners assigned to Mueller. As of July 20, 1992, Mueller was a "related person" to Carpentertown Coal & Coke Co., which signed the 1978 NBCWA, and to United States Fuel Company, which signed the 1978 and later NBCWAs. *Id.*; *see also* Pet. 12.

III. The *Eastern* Decision

In *Eastern,* a sharply divided Court held that the Coal Act was unconstitutional as applied to the petitioner there. The plurality concluded that the Coal Act should be reviewed under the Takings Clause, and that it effected an unconstitutional taking as applied to Eastern. 524 U.S. at 522-23 (plurality). Justice Kennedy dissented from the plurality's conclusion that the Takings Clause governed, but concluded that, as applied to Eastern, the Coal Act violated the Due Process Clause. *Id.* at 539-50 (Kennedy, J., dissenting in part and concurring in the judgment). The four dissenting Justices agreed with Justice Kennedy that the Coal Act should be analyzed under the Due Process Clause, but concluded that it did not violate due process principles. *Id.* at 553-68 (Breyer, J., dissenting).

Eastern was a signatory to each NBCWA (or amendment) executed between 1947 and 1964. In 1963, Eastern began the transfer of its coal operations to a subsidiary, Eastern Associated Coal Corp. ("EACC"). This transfer was completed by 1965. After enactment of the Coal Act, Eastern was assigned under 26 U.S.C. § 9706(a)(3) more than 1,000 Combined Fund beneficiaries based on miners' employment with Eastern prior to 1966 and Eastern's status as the pre-1978 signatory operator for whom the miners had worked for the longest period of time. *Eastern*, 524 U.S. at 516-17 (plurality). Eastern contended that these assignments violated the Takings and Due Process Clauses of the Fifth Amendment.

It is undisputed that all nine Members of the Court in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly contemplated lifetime health benefits for retired miners and their dependents. 524 U.S. at 509, 530, 535 (plurality), 550 (Kennedy, J., dissenting in part and concurring in the judgment), 553 (Stevens, J., dissenting). The five Justices who combined to declare the Coal Act unconstitutional as applied to Eastern concluded that the negotiation of the 1974 NBCWA was a watershed event because it marked the first time that an explicit reference to lifetime retiree health benefits was included in the collective bargaining agreement.

Because the plurality and Justice Kennedy considered Eastern as an employer that left the coal industry in 1965 and did not sign the 1974 and later NBCWAs, the plurality viewed the Coal Act as imposing a burden on Eastern "unrelated to any commitment that the employer[] made," *id.* at 537, and Justice Kennedy viewed Eastern as "not responsible for the expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy." *Id.* at 550. Because Eastern sold its subsidiary EACC in 1987, well before the July 20, 1992 date for determining "related person" status under the statute, the plurality noted that Eastern's relationship with EACC did not bear on Eastern's liability under the Coal Act. *Id.* at 530. Thus, the Court did not confront any situation in which, as here, a coal operator was a "related person" to, and a member of a "controlled group" of companies with, one or more other companies that signed the 1974, 1978, or later NBCWAs.

IV. Proceedings Below

On June 30, 1999, the Companies began this action against the Commissioner of Social Security and the Trustees of the Combined Fund in the Western District of Pennsylvania. The Companies claimed, *inter alia*, that the Commissioner's refusal to rescind certain beneficiary assignments was unlawful

under this Court's decision in *Eastern Enterprises*. Specifically, the Companies argued that their positions were substantially identical to that of the petitioner in *Eastern* and that, therefore, the assignments should be voided. The Companies also claimed that the Coal Act, as applied to them, violates the Takings Clause and the Due Process Clause of the Fifth Amendment.

The Commissioner moved to dismiss, or, alternatively, for summary judgment. The Trustees filed an Answer and Counterclaim seeking a declaration that the Coal Act is constitutional as applied to the Companies, as well as an injunction requiring the Companies to pay the premiums due under the Act. The Trustees also filed a legal memorandum in support of the Commissioner's motion. By Memorandum Order dated July 25, 2000, the district court granted the Commissioner's motion and issued an order dismissing all pertinent claims. Pet. App. 50a-61a.

On appeal, the Companies continued to argue that they are substantially identical to Eastern. The court of appeals rejected this argument, and affirmed the district court's dismissal. Pet. App. 25a-31a. In upholding the validity of the Coal Act as applied to coal operators like the Companies that are statutory "related persons" to companies that signed the 1974 and later NBCWAs, and concluding that such operators are not "substantially identical" to Eastern, the court of appeals reconfirmed the result it had reached in *Unity Real Estate v. Holland*, 178 F.3d 174 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999), and *Anker Energy Corp. v. Consolidated Coal Co.*, 177 F.3d 161 (3d Cir.), *cert. denied*, 528 U.S. 1003 (1999).

ARGUMENT

The court of appeals' decision is correct, there is no disagreement among the courts of appeals on the issue, and further review is not warranted. The Companies concede that their petition raises "substantially the same" arguments made in

the petitions in *Massey* and *Berwind*, which this Court denied only three weeks ago. As the courts of appeals in those cases recognized, *Eastern* does not extend to entities like the Companies. Congress rationally determined that such entities, based on their status as "related persons" to 1974 or later NBCWA signatories, should be treated as part of a single corporate group that collectively made the very commitments that all Members of the Court in *Eastern* regarded as adequate constitutional justification for the exercise of legislative power in the Coal Act. *Eastern* therefore does not entitle the Companies to relief.

I. *Eastern* Does Not Support the Companies' Position

The Companies' sole argument in support of their petition is that they are, in all material respects, substantially identical to the petitioner in *Eastern*. As the court of appeals correctly held, however, the Companies' argument "ignores a critical distinction" – *Eastern* did not involve the Coal Act's related person provisions. Pet. App. 27a.

Nonetheless, the Companies try to dismiss their relationships with companies that signed the 1974 or 1978 and later NBCWAs by incorrectly asserting that the promises of retiree health care contained in those collective bargaining agreements concern only the retired employees who worked for those specific signatory employers and no one else. Pet. 11, 14. This betrays a fundamental misunderstanding of the nature of multiemployer plans. Contrary to the Companies' assertion, the commitments made by signatory employers in the Companies' controlled groups ran to all of the beneficiaries of the UMWA Plans, including all of the retirees and their dependents involved in the case.

Those commitments, properly attributable to the Companies as part of a controlled group with the companies that signed NBCWAs referring expressly to lifetime health care, are sufficient to sustain the validity of the Coal Act as applied

to the Companies. As SSA and the courts below correctly recognized, the Companies and Eastern are not similarly situated, and the Companies are not entitled to prevail merely by claiming constitutional equivalence to Eastern.

The Companies mount no independent constitutional attack on the Coal Act; citing no other authority, they simply argue that *Eastern* requires that the Coal Act be held unconstitutional as applied to them. The Companies' case thus stands or falls solely on the question of whether *Eastern* mandates the result the Companies seek. As the court of appeals properly determined, and as numerous courts have recognized in decisions that the Companies simply ignore, it does not. *Eastern* did not address the constitutionality of the Coal Act as applied to entities such as the Companies, which are part of a controlled group of corporations including post-1974 NBCWA signatories. *See*, in addition to *Massey*, *Berwind*, *Unity Real Estate*, and *Anker Energy*, *Holland v. Big River Minerals Co.*, 181 F.3d 597 (4th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000); *Nell Jean Industries, Inc. v. Barnhart*, 224 F. Supp. 2d 10 (D.D.C. 2002), *appeal docketed*, No. 03-5099 (D.C. Cir. Apr. 10, 2003); *Wheeling-Pittsburgh Steel Corp. v. Barnhart*, 229 F. Supp. 2d 539 (N.D. W. Va. 2002), *appeal docketed*, Nos. 02-1799, 02-1800 (4th Cir. July 29th, 2002).

II. The Companies Are Not Substantially Identical to Eastern

Despite their contention, the Companies are not substantially identical to Eastern. The plurality and concurring opinions in *Eastern* both proceeded on the basis that Eastern had left the coal industry in 1965 and had not signed an NBCWA since 1964. 524 U.S. at 516 (plurality), 550 (Kennedy, J., dissenting in part and concurring in the judgment). By contrast, a commonly owned company in each of the

Companies' controlled groups signed multiple NBCWAs after 1974.

Whatever their differences with respect to the pre-1974 NBCWAs, all of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly referred to lifetime health benefits. *See, e.g.*, 524 U.S. at 530 (plurality opinion) (the 1974, 1978, and later NBCWAs "first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members."); *id.* at 550 (Kennedy, J., dissenting in part and concurring in the judgment) (Eastern "was not responsible for [the beneficiaries'] expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business."); *id.* at 553 (Stevens, J., dissenting) (the "implicit agreement [in the industry to provide retiree health care benefits] was made explicit in 1974"). The Companies do not dispute this.

The 1974, 1978, and subsequent NBCWAs thus created in retired coal miners a reasonable expectation of lifetime health benefits. As the D.C. Circuit said in *Association of Bituminous Contractors* v. *Apfel*, "[t]he clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." 156 F.3d 1246, 1257 (D.C. Cir. 1998).

Nonetheless, the Companies contend that *Eastern* does not permit consideration of the Coal Act's "related person" provisions in determining the constitutionality of SSA's beneficiary assignments. Pet. 15-17. In fact, neither the plurality nor Justice Kennedy in *Eastern* addressed the operation of the "related person" provisions, which were not at issue in that case. The Companies' argument also disregards the central role that "controlled group" liability plays under

various statutory schemes, including the Internal Revenue Code and pension and benefits law generally (*see, e.g.*, Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1132 *et seq.*).

Because Eastern sold its subsidiary EACC in 1987, five years before the date that Congress chose for determining "related person" status under the Coal Act, the plurality and Justice Kennedy in *Eastern* did not consider the constitutionality of the "related person" provisions of the statute. The plurality expressly stated that Eastern did not qualify as a related person to a post-1974 signatory employer and that the statute did *not* impose liability on Eastern as a related person to such an employer. As a consequence, neither the plurality nor Justice Kennedy thought it relevant that EACC, while still wholly owned by Eastern, signed the NBCWAs of 1974, 1978, 1981, and 1984. *See, e.g.*, 524 U.S. at 530 (plurality opinion).

The Companies' suggestion that the result in *Eastern* would not have been different if Eastern had been tied to a "related person" under the Coal Act that had signed a 1974 or later NBCWA is simply wrong. Unlike the imposition of liability on Eastern, controlled group liability under ERISA and MPPAA routinely has withstood constitutional attack. *See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Skyland Leasing*, 691 F. Supp. 6, 27 (W.D. Mich. 1987) (rejecting Takings Clause challenge to controlled group liability under MPPAA), *aff'd*, 892 F.2d 1043 (6th Cir. 1990); *Connors v. Brady-Cline Coal Co.*, 668 F. Supp. 5, 9 n.4 (D.D.C. 1987) (rejecting due process challenge to controlled group liability under MPPAA); *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979) (rejecting Takings Clause challenge to controlled group liability upon termination of single employer pension plan under 29 U.S.C. § 1362), *aff'd*,

630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). *See also Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995) (sustaining liability of sister banks for each other's debts under FIRREA), *cert. denied*, 519 U.S. 810 (1996); *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449 (2d Cir. 1995) (same). Unless the plurality opinion and Justice Kennedy's opinion in *Eastern* somehow could be said to have overruled *sub silentio* the long line of cases upholding controlled group liability – a proposition that the Companies do not advance – then controlled group liability is constitutional here as well.

Further, by incorporating "controlled group" liability into the Coal Act, Congress made a rational choice "to apportion liability among all the companies that collectively made the promise" of lifetime health benefits to the affected miners. *LTV Steel Co. v. Shalala* (*In re Chateaugay Corp.*), 53 F.3d 478, 491 (2d Cir. 1995), *cert. denied*, 516 U.S. 913 (1995). The Coal Act holds the entire controlled group liable for the legitimate expectations to which any of the group's members contributed. Through these provisions, Congress sought to collapse internal corporate distinctions and treat such groups of companies under common control as single entities for purposes of liability. Congress decided, in other words, that it should not matter in the financing of retiree health care that the Companies have operated their coal business through more than one commonly owned entity, while other coal operators have concentrated all of their coal mining activities in a single corporate entity. The "related person" provisions of the Coal Act simply cut through these corporate forms and impose liability on the overall enterprise. They thus avoid the need to trace the history of shifting entities and to penetrate convoluted structures entirely under private control.

Having rationally decided that controlled group members should be held jointly and severally liable for paying for the expectations that had been created, Congress then had to fix some date for the determination of "related person" status.

Although Congress constitutionally could have chosen a different cut-off date, it rationally chose July 20, 1992, a date close to, but slightly before, the date of the statute's enactment. By choosing a date close to the statute's enactment date, Congress enabled the "related person" inquiry to concentrate on contemporary corporate structures and events, rather than seeking to unravel, for hundreds of employers, including the Companies and their "related persons," corporate transfers and other transactions long since completed. By choosing a date slightly in advance of the statute's enactment date, Congress avoided the possibility that employers, having learned that legislation might well be imminent, would seek hastily to rearrange their corporate structures and affairs so as to eliminate or reduce their potential liability under the pending legislative proposal. As the draft Conference Committee report explained:

> This date was fixed to insure that parent corporations or other entities related to a signatory company could not evade responsibility for the obligations imposed under the [Coal Act] by divesting themselves of their ownership connection prior to enactment.

138 Cong. Rec. 34002 (1992). This legislative choice does not violate the Due Process Clause or any other provision of the Constitution. *See, e.g., Eastern*, 524 U.S. at 525-26 (plurality opinion) (citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 27, 2003

APPENDIX

Subtitle C—Health Care of Coal Miners

Sec. 19141. Short Title.

This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992".

Sec. 19142. Findings and Declaration of Policy.

(a) FINDINGS.—The Congress finds that—

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) STATEMENT OF POLICY.—It is the policy of this subtitle

(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Sec. 19143. Coal Industry Health Benefits Program.

(a) IN GENERAL.—The Internal Revenue Code of 1986 is amended by adding at the end the following new subtitle:

"Subtitle J—Coal Industry Health Benefits

"CHAPTER 99—COAL INDUSTRY HEALTH BENEFITS

"Subchapter A—Definitions of General Applicability

"Sec. 9701. Definitions of General Applicability.

"(a) PLANS AND FUNDS.—For purposes of this chapter—

"(1) UMWA BENEFIT PLAN.

"(A) IN GENERAL.—The term 'UMWA Benefit Plan' means a plan—

"(i) which is described in section 404(c), or a continuation thereof; and

"(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

"(B) 1950 UMWA BENEFIT PLAN.—The term '1950 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

"(C) 1974 UMWA BENEFIT PLAN.—The term '1974 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

"(2) 1950 UMWA PENSION PLAN.—The term '1950 UMWA Pension Plan' means a pension plan described in section 404 (c) (or a contination thereof), participation in which is substantially limited to individuals who retired before 1976.

"(3) 1974 UMWA PENSION PLAN.—The term '1974 UMWA Pension Plan' means a pension plan described in section 404 (c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

"(4) 1992 UMWA BENEFIT PLAN.—The term '1992 UMWA Benefit Plan' means the plan referred to in section 9713A.

"(5) COMBINED FUND.—The term 'Combined Fund' means the United Mine Workers of America Combined Benefit Fund established under section 9702.

"(b) AGREEMENTS.—For purposes of this section

"(1) COAL WAGE AGREEMENT.—The term 'coal wage agreement' means—

"(A) the National Bituminous Coal Wage Agreement, or

"(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

"(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

"(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

"(2) SETTLORS.—The term 'settlors' means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the 'BCOA').

"(3) NATIONAL BITUMINOUS COAL WAGE AGREEMENT.—The term 'National Bituminous Coal Wage Agreement' means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

"(c) TERMS RELATING TO OPERATORS.—For purposes of this section

"(1) SIGNATORY OPERATOR.—The term 'signatory operator' means a person which is or was a signatory to a coal wage agreement.

"(2) RELATED PERSONS.—

"(A) IN GENERAL.—A person shall be considered to be a related person to a signatory operator if that person is—

"(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

"(ii) a trade or business which is under common control (as determined under section 52 (b)) with such signatory operator; or

"(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

"(B) TIME FOR DETERMINATION.—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

"(3) 1988 AGREEMENT OPERATOR.—The term '1988 agreement operator' means—

"(A) a signatory operator which was a Signatory to the 1988 National Bituminous Coal Wage Agreement,

"(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

"(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

"(4) LAST SIGNATORY OPERATOR.—The term 'last signatory operator' means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

"(5) ASSIGNED OPERATOR.—The term 'assigned operator' means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

"(6) OPERATORS OF DEPENDENT BENEFICIARIES.—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

"(7) Business.—For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

"(d) ENACTMENT DATE.—For purposes of this chapter, the term enactment date' means the date of the enactment of this chapter.

"Subchapter B—Combined Benefit Fund

"PART I—ESTABLISHMENT AND BENEFITS

"Sec. 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

"(a) ESTABLISHMENT.

"(1) IN GENERAL.—As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

"(2) MERGER OF RETIREE BENEFIT PLANS.—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

"(3) TREATMENT OF PLAN.—The Combined Fund shall be—

"(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c) (5)),

"(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(4) TAX TREATMENT.—For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

"(b) BOARD OF TRUSTEES.

"(1) IN GENERAL. For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

"(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

"(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

"(C) two individuals designated by the United Mine Workers of America; and

"(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

"(2) SUCCESSOR TRUSTEES.—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

"(3) SPECIAL RULES.—

"(A) BCOA.—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the

BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

"(B) FORMER SIGNATORIES.—The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

"(c) PLAN YEAR.—The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

"Sec. 9703. Plan Benefits.

"(a) IN GENERAL.—Each eligible beneficiary of the Combined Fund shall receive—

"(1) health benefits described in subsection (b), and

"(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

"(b) HEALTH BENEFITS.

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis.—The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), the coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) PLAN PAYMENT RATES.—

"(A) IN GENERAL.—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

"(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

"(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

"(B) REDUCTIONS.—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

"(i) by the aggregate death benefit premiums, determined under section 9704(c) for the plan year, and

"(ii) by the amount reserved for plan administration under subsection (d).

"(C) INCREASES.—The amount determined under subparagraph (A)(ii) shall be increased—

"(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

"(ii) by any carryover to the plan year from any preceding plan year which—

"(I) is derived from amounts described in section 9704 (e)(3)(B)(i), and

"(II) the trustees elect to use to pay benefits for the current year, and

"(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

"(3) QUALIFIED PROVIDERS.—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

"(4) EFFECTIVE DATE.—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

"(c) DEATH BENEFITS COVERAGE.

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

"(2) TERMINATION OF COVERAGE.—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

"(d) RESERVES FOR ADMINISTRATION.—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704 (a) during the plan year.

"(e) LIMITATION ON ENROLLMENT.—The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this subchapter, the term 'eligible beneficiary' means an individual who—

"(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

"(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

"PART II—FINANCING

"Sec. 9704. Liability of Assigned Operators.

"(a) ANNUAL PREMIUMS.—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

"(1) the health benefit premium determined under subsection (b) for such plan year, plus

"(2) the death benefit premium determined under subsection (c) for such plan year, plus

"(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

"(b) HEALTH BENEFIT PREMIUM.—For purposes of this chapter—

"(1) IN GENERAL.—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

"(2) PER BENEFICIARY PREMIUM.—The Secretary of Health and Human Services shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

"(A) the amount determined by dividing

"(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

"(ii) the number of such individuals, plus

"(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

"(3) ADJUSTMENTS FOR MEDICARE REDUCTIONS.—If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

"(c) DEATH BENEFIT PREMIUM.—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703 (c).

"(d) UNASSIGNED BENEFICIARIES PREMIUM.—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

"(e) PREMIUM ACCOUNTS; ADJUSTMENTS.—

"(1) ACCOUNTS.—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

"(2) ALLOCATIONS.—

"(A) ADMINISTRATIVE EXPENSES.—Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

"(B) INTEREST.—Interest shall be allocated to the account established for health benefit premiums.

"(3) SHORTFALLS AND SURPLUSES.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be

proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

"(B) EXCEPTION.—Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

"(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703 (b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

"(ii) interest credited under paragraph (2) (B) for the plan year or any preceding plan year.

"(C) NO AUTHORITY FOR INCREASED PAYMENTS.—Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703 (b)(2).

"(f) APPLICABLE PERCENTAGE.—For purposes of this section

"(1) IN GENERAL.—The term 'applicable percentage' means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

"(2) ANNUAL ADJUSTMENTS.—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

"(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

"(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c) (6) during the period described in subparagraph (A).

"(g) PAYMENT OF PREMIUMS.

"(1) IN GENERAL.—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

"(2) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(h) INFORMATION.—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Secretary of Health and Human Services information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

"(i) TRANSITION RULES.

"(1) 1988 AGREEMENT OPERATORS.

"(A) 1ST YEAR COSTS.—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and

administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

"(B) DEFICITS FROM MERGED PLANS.—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

"(C) FAILURE.—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

"(D) PREMIUM REDUCTIONS.—

"(i) 1ST YEAR PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

"(ii) DEFICIT PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the 'evergreen clause' found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

"(iii) LIMITATION.—Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

"(iv) PLAN YEARS.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

"(E) ALLOCATIONS OF CONTRIBUTIONS AND REFUNDS.—Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

"(2) 1ST PLAN YEAR.—In the case of the plan year of the Combined Fund beginning February 1, 1993—

"(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

"(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

"(3) STARTUP COSTS.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

"Sec. 9705. Transfers.

"(a) TRANSFER OF ASSETS FROM 1950 UMWA PENSION PLAN.—

"(1) IN GENERAL.—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

"(A) $70,000,000 on February 1, 1993,

"(B) $70,000,000 on October 1, 1993, and

"(C) $70,000,000 on October 1, 1994.

"(2) RESERVATION.—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

"(3) USE OF FUNDS.—Amounts transferred to the Combined Fund under paragraph (1) shall—

"(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February l, 1993, and

"(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704 (a) (3) and the death benefit premium under section 9704(a) (2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

"(4) TAX TREATMENT; VALIDITY OF TRANSFER.—

"(A) NO DEDUCTION.—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA

Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

"(B) OTHER TAX PROVISIONS.—Any transfer pursuant to paragraph (1)—

"(i) Shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

"(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

"(5) TREATMENT OF TRANSFER.—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines, or penalties of any kind whatsoever.

"(b) TRANSFERS FROM ABANDONED MINE RECLAMATION FUND.—

"(1) IN GENERAL.—The Combined Fund shall include any amount transferred to the Fund under section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

"(2) USE OF FUNDS.—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704 (a) (3) of each assigned operator for the plan year in which transferred.

"Sec. 9706. Assignment of Eligible Beneficiaries.

"(a) In GENERAL.—For purposes of this chapter, the Secretary of Health and Human Services shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any

related person with respect to which) remains in business in the following order:

"(1) First, to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

"(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

"(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

"(b) RULES RELATING TO EMPLOYMENT AND REASSIGNMENT UPON PURCHASE.—For purposes of subsection (a)—

"(1) AGGREGATION RULES.—

"(A) RELATED PERSON.—Any employment of a coal industry retiree in the coal industry by a signatory operator, shall be treated as employment by any related persons to such operator.

"(B) CERTAIN EMPLOYMENT DISREGARDED.—Employment with—

"(i) a person which is (and all related persons with respect to which are) no longer in business, or

"(ii) a person during a period during which such person was not a signatory to a coal wage agreement, shall not be taken into account.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

"(c) IDENTIFICATION OF ELIGIBLE BENEFICIARIES.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Secretary of Health and Human Services a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

"(d) COOPERATION BY OTHER AGENCIES AND PERSONS.—

"(1) COOPERATION.—The head of any department, agency, and instrumentality of the United States shall cooperate fully and promptly with the Secretary of Health and

Human Services in providing information which will enable the Secretary to carry out his responsibilities under this section.

"(2) PROVIDING OF INFORMATION.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Secretary of Health and Human Services in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Secretary shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Secretary, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Secretary shall be so advised.

"(B) LIMITATION.—Any information provided under subparagraph (A) shall be limited to information necessary for the Secretary to carry out his duties under this section.

"(3) TRUSTEES.—The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Secretary in furnishing, or assisting the Secretary to obtain, any information the Secretary needs to carry out the Secretary's responsibilities under this section.

"(e) NOTICE BY SECRETARY.—

"(1) NOTICE TO FUND.—The Secretary of Health and Human Services shall advise the trustees of the Combined

Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

"(2) OTHER NOTICE.—The Secretary of Health and Human Services shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

"(f) RECONSIDERATION BY SECRETARY.—

"(1) IN GENERAL.—Any assigned operator receiving a notice under section (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Secretary of Health and Human Services detailed information as to the work history of the beneficiary and the basis of the assignment.

"(2) REVIEW.—An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Secretary of Health and Human Services shall conduct such review if the Secretary finds the operator provided evidence with the request constituting a prima facie case of error.

"(3) RESULTS OF REVIEW.—

"(A) ERROR.—If the Secretary of Health and Human Services determines under a review under paragraph (2) that an assignment was in error—

"(i) the Secretary shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review the beneficiary's record for reassignment under subsection (a).

"(B) NO ERROR.—If the Secretary of Health and Human Services determines under a review conducted under paragraph (2) that no error occurred, the Secretary shall notify the assigned operator.

"(4) DETERMINATIONS.—Any determination by the Secretary of Health and Human Services under paragraph (2) or (3) shall be final.

"(5) PAYMENT PENDING REVIEW.—An assigned operator shall pay the premiums under section 9704 pending review by the Secretary of Health and Human Services or by a court under this subsection.

"(6) PRIVATE ACTIONS.—Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Secretary.

"(g) CONFIDENTIALITY OF INFORMATION.—Any person to which information is provided by the Secretary of Health and Human Services under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

"PART III-ENFORCEMENT

"Sec. 9707. Failure to Pay Premium

"(a) GENERAL RULE.—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

"(b) AMOUNT OF PENALTY.—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

"(c) NONCOMPLIANCE PERIOD.—For purposes of this section, the term 'noncompliance period' means, with respect to any failure to pay any premium or installment thereof, the period—

"(1) beginning on the due date for such premium or installment, and

"(2) ending on the date of payment of such premium or installment.

"(d) LIMITATIONS ON AMOUNT OF PENALTY.—

"(1) IN GENERAL.—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

"(2) CORRECTIONS.—No penalty shall be imposed by subsection (a) on any failure if—

"(A) such failure was due to reasonable cause and not to willful neglect, and

"(B) such failure is corrected during the 30 day period beginning on the 1st date that any of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

"(3) WAIVER.—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary

determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

"(e) LIABILITY FOR PENALTY.—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

"(f) TREATMENT.—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

"PART IV—OTHER PROVISIONS

"Sec. 9708. Effect on Pending Claims or Obligations

"All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims or obligations based on the 'evergreen' clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

"Subchapter C—Health Benefits of Certain Miners

"PART I—INDIVIDUAL EMPLOYER PLANS

"Sec. 9711. Continued Obligations of Individual Employer Plans.

"(a) COVERAGE OF CURRENT RECIPIENTS.—The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an individual

employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

"(b) COVERAGE OF ELIGIBLE RECIPIENTS.—

"(1) IN GENERAL.—The last signatory operator of any individual who, as of February 1, 1993, is not receiving retiree health benefits under the individual employer plan maintained by the last signatory operator pursuant to a 1978 or subsequent coal wage agreement, but has met the age and service requirements for eligibility to receive benefits under such plan as of such date, shall, at such time as such individual becomes eligible to receive benefits under such plan, provide health benefits coverage to such individual and the individual's eligible beneficiaries which is described in paragraph (2). This paragraph shall not apply to any individual who retired from the coal industry after September 30, 1994, or any eligible beneficiary of such individual.

"(2) COVERAGE.—Subject to the provisions of subsection (d), health benefits coverage is described in this paragraph if it is substantially the same as (and subject to all the limitations of) the coverage provided by the individual employer plan as of January 1, 1992. Such coverage shall continue for as long as the last signatory operator (and any related person) remains in business.

"(c) JOINT AND SEVERAL LIABILITY OF RELATED PERSONS.—Each related person of a last signatory operator to which subsection (a) or (b) applies shall be jointly and severally liable with the last signatory operator for the

provision of health care coverage described in subsection (a) or (b).

"(d) MANAGED CARE AND COST CONTAINMENT.—The last signatory operator shall not be treated as failing to meet the requirements of subsection (a) or (b) if benefits are provided to eligible beneficiaries under managed care and cost containment rules and procedures described in section 9712(c) or agreed to by the last signatory operator and the United Mine Workers of America.

"(e) TREATMENT OF NONCOVERED EMPLOYEE.—The existence, level, and duration of benefits provided to former employees of a last signatory operator (and their eligible beneficiaries) who are not otherwise covered by this chapter and who are (or were) covered by a coal wage agreement shall only be determined by, and shall be subject to, collective bargaining, lawful unilateral action, or other applicable law.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means any individual who is eligible for health benefits under a plan described in subsection (a) or (b) by reason of the individual's relationship with the retiree described in such subsection (or to an individual who, based on service and employment history at the time of death, would have been so described but for such death).

"(g) RULES APPLICABLE TO THIS PART AND PART II.—For purposes of this part and part II—

"(1) SUCCESSOR.—The term 'last signatory operator' shall include a successor in interest of such operator.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor

shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

"PART II-1992 UMWA BENEFIT PLAN

"Sec. 9712. Establishment and Coverage of 1992 UMWA Benefit Plan.

"(a) CREATION OF PLAN.—

"(1) IN GENERAL.—As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

"(2) TREATMENT OF PLAN.—The 1992 UMWA Benefit Plan shall be—

"(A) a plan described in section 302 (c) (5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c) (5)).

"(B) an employee welfare benefit plan within the meaning of section 3 (1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(b) COVERAGE REQUIREMENT.—

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall only provide health benefits coverage to any eligible beneficiary who is not eligible for benefits under the Combined Fund and shall not provide such coverage to any other individual.

"(2) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means an individual who—

"(A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

"(B) with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

"(c) HEALTH BENEFITS.

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) MANAGED CARE.—The 1992 UMWA Benefit Plan shall develop managed care and cost containment rules which shall be applicable to the payment of benefits under this subsection. Application of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not limited to, elements described in paragraph (3).

"(3) MAJOR ELEMENTS OF RULES.—Elements described in this paragraph are—

"(A) implementing formulary for drugs and subjecting the prescription program to a rigorous review of appropriate use,

"(B) obtaining a unit price discount in exchange for patient volume and preferred provider status with the amount of the potential discount varying by geographic region,

"(C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,

"(D) utilizing, in the claims payment function 'appropriateness of service' protocols under title XVIII of the Social Security Act if more stringent,

"(E) creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

"(F) selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

"(G) utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

"(4) LAST SIGNATORY OPERATORS.—The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

"(5) STANDARDS OF QUALITY.—Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets the standards of quality adopted by, a medical peer review panel, which has been established

"(A) by the settlors, or

"(B) by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

"(d) GUARANTEE OF BENEFITS.—

"(1) IN GENERAL.—All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

"(A) the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

"(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b) (2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

"(C) the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

"(2) ADJUSTMENTS.—The 1992 UMWA Benefit Plan shall provide for—

"(A) annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

"(B) adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

"(3) ADDITIONAL LIABILITY.—Amy last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

"(4) JOINT AND SEVERAL LIABILITY.—A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

"(5) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(6) 1988 LAST SIGNATORY OPERATOR.—For purposes of this section, the term '1988 last signatory operator' means a last signatory operator which is a 1988 agreement operator.

"Subchapter D—Other Provisions

"Sec. 9721. Civil Enforcement.

"The provisions of section 4301 of the Employee Retirement Income Security Act of 1974 shall apply to any claim arising out of an obligation to pay any amount required to be paid by this chapter in the same manner as any claim arising out of an obligation to pay withdrawal liability under subtitle E of title IV of such Act. For purposes of the preceding sentence, a signatory operator and related persons shall be treated in the same manner as employers.

"Sec. 9722. Sham Transactions.

"If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability shall be imposed) without regard to such transaction."

(b) AMENDMENTS TO SURFACE MINING ACT.—

(1) EXTENSION OF FEE PROGRAM.—Section 402 (b) of the Surface Mining Control and Reclamation Act of 1977 (30

U.S.C. 1232(b)) is amended by striking "September 30, 1995" and inserting "September 30, 2004".

(2) TRANSFER TO FUND.—Section 402 of such Act (30 U.S.C. 1232) is amended by adding at the end the following new subsection

"(h) TRANSFER OF FUNDS TO COMBINED FUND.—(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

"(2) The Secretary shall transfer from the fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 for any fiscal year an amount equal to the sum of—

"(A) the amount of the interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

"(B) the amount by which the amount described in subparagraph (A) is less than $70,000,000.

"(3) (A) The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Fund in which the transfer is made.

"(B) The aggregate amount which may be transferred under paragraph (2) (B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund after September 30, 1992, and before October 1, 1995.

"(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year."

(3) CONFORMING AMENDMENTS.—(A) Section 401(c) of such Act (30 U.S.C. 1231(c)) is amended by striking "and" at the end of paragraph (11), by redesignating paragraph (12) as paragraph (13), and by adding after paragraph (11) the following new paragraph:

"(12) for the purpose described in section 402 (h); and".

(B) Section 402(g) (1) of such Act (30 U.S.C. 1232(g)) is amended by striking "Moneys" and inserting "Except as provided in subsection (h), moneys".